MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

September 8, 2010 to March 11, 2011

JOHN O. JUROSZEK
REPORTER OF DECISIONS

VOL. 488
FIRST EDITION

WEST®
A Thomson Reuters business

2012

Copyright 2012, by Michigan Supreme Court

The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1984.

SUPREME COURT

	Term Expires January 1 of
Chief Justice	
MARILYN KELLY	2013[1]
ROBERT P. YOUNG, Jr.	2019[2]
Justices	
MICHAEL F. CAVANAGH	2015
MARILYN KELLY	2013[2]
MAURA D. CORRIGAN	2015[3]
ROBERT P. YOUNG, Jr.	2019[1]
STEPHEN J. MARKMAN	2013
DIANE M. HATHAWAY	2017
ALTON THOMAS DAVIS	2011[4]
MARY BETH KELLY	2019[5]
BRIAN H. ZAHRA	2013[6]

Commissioners

MICHAEL J. SCHMEDLEN, Chief Commissioner
SHARI M. OBERG, Deputy Chief Commissioner

TIMOTHY J. RAUBINGER	DANIEL C. BRUBAKER
LYNN K. RICHARDSON	MICHAEL S. WELLMAN
KATHLEEN A. FOSTER[7]	GARY L. ROGERS
NELSON S. LEAVITT	RICHARD B. LESLIE
DEBRA A. GUTIERREZ-McGUIRE	FREDERICK M. BAKER, Jr.
ANNE-MARIE HYNOUS VOICE	KATHLEEN M. DAWSON
DON W. ATKINS	RUTH E. ZIMMERMAN
JÜRGEN O. SKOPPEK	SAMUEL R. SMITH

ANNE E. ALBERS

State Court Administrator: CARL L. GROMEK

Clerk: CORBIN R. DAVIS
Reporter of Decisions: JOHN O. JUROSZEK[8]
Crier: DAVID G. PALAZZOLO

[1] To January 5, 2011.

[2] From January 5, 2011.

[3] To January 14, 2011.

[4] To January 1, 2011.

[5] From January 1, 2011.

[6] From January 14, 2011.

[7] To December 31, 2010.

[8] From October 13, 2010.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM B. MURPHY	2013
Chief Judge Pro Tem	
DAVID H. SAWYER	2017
Judges	
MARK J. CAVANAGH	2015
KATHLEEN JANSEN	2013
E. THOMAS FITZGERALD	2015
HENRY WILLIAM SAAD	2015
RICHARD A. BANDSTRA	2015[1]
JOEL P. HOEKSTRA	2017
JANE E. MARKEY	2015
PETER D. O'CONNELL	2013
WILLIAM C. WHITBECK	2017
MICHAEL J. TALBOT	2015
KURTIS T. WILDER	2017
BRIAN K. ZAHRA	2013[2]
PATRICK M. METER	2015
DONALD S. OWENS	2017
KIRSTEN FRANK KELLY	2013
CHRISTOPHER M. MURRAY	2015
PAT M. DONOFRIO	2017
KAREN FORT HOOD	2015
STEPHEN L. BORRELLO	2013
DEBORAH A. SERVITTO	2013
JANE M. BECKERING	2013
ELIZABETH L. GLEICHER	2013
CYNTHIA DIANE STEPHENS	2017
MICHAEL J. KELLY	2015
DOUGLAS B. SHAPIRO	2013
AMY RONAYNE KRAUSE	2013[3]

Chief Clerk:
SANDRA SCHULTZ MENGEL[4]
LARRY S. ROYSTER[5]

Research Director:
LARRY S. ROYSTER

[1] To January 8, 2011.

[2] To January 14, 2011.

[3] From December 13, 2010.

[4] To January 31, 2011.

[5] From January 31, 2011.

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2015
2.	ALFRED M. BUTZBAUGH	2013
	JOHN E. DEWANE	2015
	JOHN M. DONAHUE	2011
	CHARLES T. LaSATA	2011
3.	DEBORAH ROSS ADAMS	2013
	DAVID J. ALLEN	2015
	WENDY M. BAXTER	2013
	ANNETTE J. BERRY	2013
	GREGORY D. BILL	2013
	SUSAN D. BORMAN	2015
	ULYSSES W. BOYKIN	2015
	MARGIE R. BRAXTON	2011
	MEGAN MAHER BRENNAN	2015
	JAMES A. CALLAHAN	2011
	MICHAEL J. CALLAHAN	2015
	JEROME C. CAVANAGH	2013
	ERIC WILLIAM CHOLACK	2011
	JAMES R. CHYLINSKI	2011
	ROBERT J. COLOMBO, Jr.	2013
	DAPHNE MEANS CURTIS	2015
	CHRISTOPHER D. DINGELL	2015
	GERSHWIN ALLEN DRAIN	2011
	PRENTIS EDWARDS	2013
	CHARLENE M. ELDER	2015
	VONDA R. EVANS	2015
	EDWARD EWELL, Jr.	2013
	PATRICIA SUSAN FRESARD	2011
	SHEILA ANN GIBSON	2011
	JOHN H. GILLIS, Jr.	2015
	DAVID ALAN GRONER	2011
	RICHARD B. HALLORAN, Jr.	2013
	AMY PATRICIA HATHAWAY	2013
	CYNTHIA GRAY HATHAWAY	2011

		Term Expires January 1 of
	DANIEL ARTHUR HATHAWAY	2015
	MICHAEL M. HATHAWAY	2011
	MURIEL D. HUGHES	2011
	THOMAS EDWARD JACKSON	2013
	VERA MASSEY JONES	2015
	CONNIE MARIE KELLEY	2015
	MARY BETH KELLY	2015
	TIMOTHY MICHAEL KENNY	2011
	ARTHUR J. LOMBARD	2015
	KATHLEEN I. MacDONALD	2011
	KATHLEEN M. McCARTHY	2013
	WADE H. McCREE	2015
	BRUCE U. MORROW	2011
	JOHN A. MURPHY	2011
	MARIA L. OXHOLM	2013
	LINDA V. PARKER	2011
	LYNNE A. PIERCE	2015
	LITA MASINI POPKE	2011
	DANIEL P. RYAN	2013
	MICHAEL F. SAPALA	2013
	RICHARD M. SKUTT	2015
	MARK T. SLAVENS	2011
	LESLIE KIM SMITH	2013
	VIRGIL C. SMITH	2013
	JEANNE STEMPIEN	2011
	CRAIG S. STRONG	2015
	BRIAN R. SULLIVAN	2011
	DEBORAH A. THOMAS	2013
	CAROLE F. YOUNGBLOOD	2013
	ROBERT L. ZIOLKOWSKI	2015
4.	SUSAN E. BEEBE	2011
	JOHN G. McBAIN, Jr.	2015
	CHAD C. SCHMUCKER	2011
	THOMAS D. WILSON	2013
5.	JAMES H. FISHER	2015
6.	JAMES M. ALEXANDER	2015
	MARTHA ANDERSON	2015
	LEO BOWMAN	2013
	MARY ELLEN BRENNAN	2015
	RAE LEE CHABOT	2011
	MARK A. GOLDSMITH	2013
	LISA ORTLIEB GORCYCA	2015
	NANCI J. GRANT	2015

		Term Expires January 1 of
	SHALINA D. KUMAR	2015
	CHERYL A. MATTHEWS	2011
	DENISE LANGFORD MORRIS	2013
	RUDY J. NICHOLS	2015
	COLLEEN A. O'BRIEN	2011
	DANIEL PATRICK O'BRIEN	2011
	WENDY LYNN POTTS	2013
	EDWARD SOSNICK	2013
	MICHAEL D. WARREN, Jr.	2013
	JOAN E. YOUNG	2011
7.	DUNCAN M. BEAGLE	2011
	JOSEPH J. FARAH	2011
	JUDITH A. FULLERTON	2013
	JOHN A. GADOLA	2015
	ARCHIE L. HAYMAN	2013
	GEOFFREY L. NEITHERCUT	2013
	DAVID J. NEWBLATT	2011
	MICHAEL J. THEILE	2015
	RICHARD B. YUILLE	2015
8.	DAVID A. HOORT	2011
	SUZANNE KREEGER	2015
9.	GARY C. GIGUERE, Jr.	2015
	STEPHEN D. GORSALITZ	2011
	J. RICHARDSON JOHNSON	2013
	PAMELA L. LIGHTVOET	2013
	ALEXANDER C. LIPSEY	2011
10.	JANET M. BOES	2011
	FRED L. BORCHARD	2011
	WILLIAM A. CRANE	2011
	DARNELL JACKSON	2013
	ROBERT L. KACZMAREK	2015
11.	WILLIAM W. CARMODY	2015
12.	CHARLES R. GOODMAN	2015
13.	THOMAS G. POWER	2011
	PHILIP E. RODGERS, Jr.	2015
14.	JAMES M. GRAVES, Jr.	2013
	TIMOTHY G. HICKS	2011
	WILLIAM C. MARIETTI	2011
	JOHN C. RUCK	2015
15.	PATRICK W. O'GRADY	2015
16.	JAMES M. BIERNAT, Sr.	2011
	RICHARD L. CARETTI	2011
	MARY A. CHRZANOWSKI	2011
	DIANE M. DRUZINSKI	2015

		Term Expires January 1 of
	JOHN C. FOSTER	2015
	PETER J. MACERONI	2015
	DONALD G. MILLER	2013[1]
	EDWARD A. SERVITTO, Jr.	2013
	MARK S. SWITALSKI	2013
	MATTHEW S. SWITALSKI	2015
	ANTONIO P. VIVIANO	2011
	DAVID VIVIANO	2013
	TRACEY A. YOKICH	2013
17.	GEORGE S. BUTH	2011
	PAUL J. DENEFELD	2011
	KATHLEEN A. FEENEY	2015
	DONALD A. JOHNSTON, III	2013
	DENNIS B. LEIBER	2013
	JAMES ROBERT REDFORD	2011
	PAUL J. SULLIVAN	2015
	MARK A. TRUSOCK	2013
	CHRISTOPHER P. YATES	2013
	DANIEL V. ZEMAITIS	2015
18.	WILLIAM J. CAPRATHE	2011
	KENNETH W. SCHMIDT	2013
	JOSEPH K. SHEERAN	2015
19.	JAMES M. BATZER	2015
20.	CALVIN L. BOSMAN	2011
	JON H. HULSING	2015
	EDWARD R. POST	2011
	JON VAN ALLSBURG	2013
21.	PAUL H. CHAMBERLAIN	2011
	MARK H. DUTHIE	2013
22.	ARCHIE CAMERON BROWN	2011
	TIMOTHY P. CONNORS	2013
	MELINDA MORRIS	2013
	DONALD E. SHELTON	2015
	DAVID S. SWARTZ	2015
23.	RONALD M. BERGERON	2015
	WILLIAM F. MYLES	2015
24.	DONALD A. TEEPLE	2015
25.	JENNIFER MAZZUCHI	2015
	THOMAS L. SOLKA	2011
26.	MICHAEL G. MACK	2015
27.	ANTHONY A. MONTON	2013
	TERRENCE R. THOMAS	2015

[1] To January 7, 2011.

		Term Expires January 1 of
28.	WILLIAM M. FAGERMAN	2015
29.	MICHELLE M. RICK	2011
	RANDY L. TAHVONEN	2015
30.	ROSEMARIE ELIZABETH AQUILINA	2015
	LAURA BAIRD	2013
	WILLIAM E. COLLETTE	2015
	JOYCE DRAGANCHUK	2011
	JAMES R. GIDDINGS	2011
	JANELLE A. LAWLESS	2015
	PAULA J. M. MANDERFIELD	2013
31.	JAMES P. ADAIR	2013
	PETER E. DEEGAN	2011
	DANIEL J. KELLY	2015
32.	ROY D. GOTHAM	2015
33.	RICHARD M. PAJTAS	2015
34.	MICHAEL J. BAUMGARTNER	2011
35.	GERALD D. LOSTRACCO	2015
36.	WILLIAM C. BUHL	2013
	PAUL E. HAMRE	2015
37.	ALLEN L. GARBRECHT	2011
	JAMES C. KINGSLEY	2015
	STEPHEN B. MILLER	2011
	CONRAD J. SINDT	2013
38.	JOSEPH A. COSTELLO, JR.	2015
	MICHAEL W. LABEAU	2013
	MICHAEL A. WEIPERT	2011
39.	MARGARET MURRAY-SCHOLZE NOE	2015
	TIMOTHY P. PICKARD	2013
40.	MICHAEL P. HIGGINS	2015
	NICK O. HOLOWKA	2011
41.	MARY BROUILLETTE BARGLIND	2011
	RICHARD J. CELELLO	2015
42.	MICHAEL J. BEALE	2015
	JONATHAN E. LAUDERBACH	2013
43.	MICHAEL E. DODGE	2011
44.	MICHAEL P. HATTY	2011
	DAVID READER	2011
45.	PAUL E. STUTESMAN	2013
46.	JANET M. ALLEN	2011
	DENNIS F. MURPHY	2015
47.	STEPHEN T. DAVIS	2011
48.	GEORGE R. CORSIGLIA	2011
	KEVIN W. CRONIN	2015

		Term Expires January 1 of
49.	SCOTT P. HILL-KENNEDY	2013
	RONALD C. NICHOLS	2015
50.	NICHOLAS J. LAMBROS	2013
51.	RICHARD I. COOPER	2015
52.	M. RICHARD KNOBLOCK	2015
53.	SCOTT LEE PAVLICH	2011
54.	PATRICK REED JOSLYN	2013
55.	THOMAS R. EVANS	2015
	ROY G. MIENK	2013
56.	THOMAS S. EVELAND	2013
	CALVIN E. OSTERHAVEN	2015
57.	CHARLES W. JOHNSON	2013

DISTRICT JUDGES

		Term Expires January 1 of
1.	MARK S. BRAUNLICH	2015
	TERRENCE P. BRONSON	2013
	JACK VITALE	2011
2A.	NATALIA M. KOSELKA	2011
	JAMES E. SHERIDAN	2015
2B.	DONALD L. SANDERSON	2015
3A.	BRENT R. WEIGLE	2015
3B.	JEFFREY C. MIDDLETON	2015
	WILLIAM D. WELTY	2013
4.	STACEY A. RENTFROW	2015
5.	GARY J. BRUCE	2011
	ANGELA PASULA	2015
	SCOTT SCHOFIELD	2015
	STERLING R. SCHROCK	2011
	DENNIS M. WILEY	2011
7.	ARTHUR H. CLARKE, III	2015
	ROBERT T. HENTCHEL	2011
8.	ANNE E. BLATCHFORD	2011
	PAUL J. BRIDENSTINE	2013
	CAROL A. HUSUM	2011
	ROBERT C. KROPF	2015
	JULIE K. PHILLIPS	2015
	RICHARD A. SANTONI	2015
	VINCENT C. WESTRA	2011
10.	SAMUEL I. DURHAM, Jr.	2011
	JOHN A. HALLACY	2015
	JOHN R. HOLMES	2013
	FRANKLIN K. LINE, Jr.	2015
12.	JOSEPH S. FILIP	2011
	JAMES M. JUSTIN	2013
	MICHAEL J. KLAEREN	2015
	R. DARRYL MAZUR	2015
14A.	RICHARD E. CONLIN	2015
	J. CEDRIC SIMPSON	2013
	KIRK W. TABBEY	2011
14B.	CHARLES POPE	2015
15.	JULIE CREAL	2013

		Term Expires January 1 of
	CHRISTOPHER S. EASTHOPE	2015
	ELIZABETH POLLARD HINES	2011
16.	SEAN P. KAVANAGH	2015
	KATHLEEN J. McCANN	2013
17.	KAREN KHALIL	2011
	CHARLOTTE L. WIRTH	2015
18.	SANDRA A. CICIRELLI	2013
	MARK A. McCONNELL	2015
19.	WILLIAM C. HULTGREN	2011
	MARK W. SOMERS	2015
	RICHARD WYGONIK	2013
20.	MARK J. PLAWECKI	2015
	DAVID TURFE	2013
21.	RICHARD L. HAMMER, Jr.	2015
22.	SYLVIA A. JAMES	2013
23.	GENO SALOMONE	2013
	WILLIAM J. SUTHERLAND	2015
24.	JOHN T. COURTRIGHT	2015
	RICHARD A. PAGE	2011
25.	DAVID A. BAJOREK	2015
	DAVID J. ZELENAK	2011
26-1.	RAYMOND A. CHARRON	2015[1]
26-2.	MICHAEL F. CIUNGAN	2015
27.	RANDY L. KALMBACH	2013
28.	JAMES A. KANDREVAS	2015
29.	LAURA REDMOND MACK	2013
30.	BRIGETTE R. OFFICER	2011
31.	PAUL J. PARUK	2015
32A.	ROGER J. La ROSE	2015
33.	JAMES KURT KERSTEN	2015
	MICHAEL K. McNALLY	2013
	EDWARD J. NYKIEL	2011
34.	TINA BROOKS GREEN	2013
	BRIAN A. OAKLEY	2011
	DAVID M. PARROTT	2015
35.	MICHAEL J. GEROU	2011
	RONALD W. LOWE	2013
	JAMES A. PLAKAS	2015
36.	LYDIA NANCE ADAMS	2011
	ROBERTA C. ARCHER	2013
	MARYLIN E. ATKINS	2013
	JOSEPH N. BALTIMORE	2015
	NANCY McCAUGHAN BLOUNT	2015
	IZETTA F. BRIGHT	2011
	ESTHER LYNISE BRYANT-WEEKES	2015
	RUTH C. CARTER	2011

[1] To March 3, 2011.

		Term Expires January 1 of
	GEORGE A. CHATMAN	2015[2]
	DONALD COLEMAN	2013[3]
	NANCY A. FARMER	2013
	DEBORAH GERALDINE FORD	2011
	RUTH ANN GARRETT	2013
	RONALD GILES	2015
	KATHERINE HANSEN	2011
	BEVERLY J. HAYES-SIPES	2015[4]
	PAULA G. HUMPHRIES	2011
	PATRICIA L. JEFFERSON	2015
	VANESA F. JONES-BRADLEY	2013
	KENNETH J. KING	2015
	DEBORAH L. LANGSTON	2013
	WILLIE G. LIPSCOMB, Jr.	2015
	LEONIA J. LLOYD	2011
	MIRIAM B. MARTIN-CLARK	2011
	WILLIAM McCONICO	2013
	DONNA R. MILHOUSE	2013
	B. PENNIE MILLENDER	2011
	CYLENTHIA L. MILLER	2011
	KEVIN F. ROBBINS	2013
	DAVID S. ROBINSON, Jr.	2013
	BRENDA KAREN SANDERS	2015
	NOCEEBA SOUTHERN	2011
37.	JOHN M. CHMURA	2013
	JENNIFER FAUNCE	2015
	DAWNN M. GRUENBURG	2011
	WALTER A. JAKUBOWSKI, Jr.	2013
	MATTHEW P. SABAUGH	2013
38.	CARL F. GERDS III	2015
39.	JOSEPH F. BOEDEKER	2015
	MARCO A. SANTIA	2013
	CATHERINE B. STEENLAND	2011
40.	MARK A. FRATARCANGELI	2013
	JOSEPH CRAIGEN OSTER	2015
41A.	MICHAEL S. MACERONI	2015
	DOUGLAS P. SHEPHERD	2013
	STEPHEN S. SIERAWSKI	2011
	KIMBERLEY ANNE WIEGAND	2013
41B.	LINDA DAVIS	2015
	SEBASTIAN LUCIDO	2013
	SHEILA A. MILLER	2011
42-1.	DENIS R. LeDUC	2015

[2] From December 30, 2010.

[3] To March 1, 2011.

[4] Deceased November 6, 2010.

		Term Expires January 1 of
42-2.	WILLIAM H. HACKELL, III	2011
43.	KEITH P. HUNT	2013
	JOSEPH LONGO	2011
44.	TERRENCE H. BRENNAN	2015
	DANIEL SAWICKI	2013
45A.	JAMES L. WITTENBERG	2015
45B.	MICHELLE FRIEDMAN APPEL	2015
	DAVID M. GUBOW	2015
46.	SHEILA R. JOHNSON	2015
	SUSAN M. MOISEEV	2013
	WILLIAM J. RICHARDS	2011
47.	JAMES BRADY	2015
	MARLA E. PARKER	2011
48.	MARC BARRON	2011
	DIANE D'AGOSTINI	2013
	KIMBERLY SMALL	2015
50.	RONDA FOWLKES GROSS	2013
	MICHAEL C. MARTINEZ	2015
	PRESTON G. THOMAS	2011
	CYNTHIA THOMAS WALKER	2015
51.	RICHARD D. KUHN, JR.	2015
	PHYLLIS C. MCMILLEN	2013
52-1.	ROBERT BONDY	2013
	BRIAN W. MACKENZIE	2015
	DENNIS N. POWERS	2011
52-2.	JOSEPH G. FABRIZIO	2015
	KELLEY RENAE KOSTIN	2011
52-3.	LISA L. ASADOORIAN	2013
	NANCY TOLWIN CARNIAK	2011
	JULIE A. NICHOLSON	2015
52-4.	WILLIAM E. BOLLE	2015
	DENNIS C. DRURY	2013
	MICHAEL A. MARTONE	2011
53.	THERESA M. BRENNAN	2015
	L. SUZANNE GEDDIS	2011
	CAROL SUE READER	2013
54A.	LOUISE ALDERSON	2011
	PATRICK F. CHERRY	2015
	HUGH B. CLARK	2015[5]
	FRANK J. DELUCA	2013
	CHARLES F. FILICE	2015
	AMY RONAYNE KRAUSE	2011[6]
54B.	RICHARD D. BALL	2011
	DAVID L. JORDON	2013
55.	DONALD L. ALLEN	2011

[5] To December 13, 2010.

[6] From December 22, 2010.

		Term Expires January 1 of
	THOMAS P. BOYD	2015
56A.	HARVEY J. HOFFMAN	2011
	JULIE H. REINCKE	2015
56B.	GARY R. HOLMAN	2013[7]
57.	WILLIAM A. BAILLARGEON	2011
	JOSEPH S. SKOCELAS	2015
58.	SUSAN A. JONAS	2015
	RICHARD J. KLOOTE	2013
	BRADLEY S. KNOLL	2015
	KENNETH D. POST	2011
59.	PETER P. VERSLUIS	2011
60.	HAROLD F. CLOSZ, III	2015
	MARIA LADAS HOOPES	2015
	MICHAEL JEFFREY NOLAN	2013
	ANDREW WIERENGO	2011
61.	DAVID J. BUTER	2015
	J. MICHAEL CHRISTENSEN	2011
	JEANINE NEMESI LaVILLE	2013
	BEN H. LOGAN, II	2013
	DONALD H. PASSENGER	2011
	KIMBERLY A. SCHAEFER	2015
62A.	PABLO CORTES	2015
	STEVEN M. TIMMERS	2013
62B.	WILLIAM G. KELLY	2015
63-1.	STEVEN R. SERVAAS	2015
63-2.	SARA J. SMOLENSKI	2015
64A.	RAYMOND P. VOET	2015
64B.	DONALD R. HEMINGSEN	2015
65A.	RICHARD D. WELLS	2015
65B.	STEWART D. McDONALD	2015
66.	WARD L. CLARKSON	2013
	TERRANCE P. DIGNAN	2015
67-1.	DAVID J. GOGGINS	2015
67-2.	JOHN L. CONOVER	2015
	RICHARD L. HUGHES	2011
67-3.	LARRY STECCO	2015
67-4.	MARK C. McCABE	2015
	CHRISTOPHER ODETTE	2013
68.	TRACY L. COLLIER-NIX	2015
	WILLIAM H. CRAWFORD, II	2013
	MARY CATHERINE DOWD	2011
	HERMAN MARABLE, Jr.	2013
	NATHANIEL C. PERRY, III	2015
70-1.	TERRY L. CLARK	2013
	M. RANDALL JURRENS	2011
	M. T. THOMPSON, Jr.	2015

[7] To February 28, 2011.

		Term Expires January 1 of
70-2.	CHRISTOPHER S. BOYD	2011
	ALFRED T. FRANK	2015
	KYLE HIGGS TARRANT	2013
71A.	LAURA CHEGER BARNARD	2015
	JOHN T. CONNOLLY	2013
71B.	KIM DAVID GLASPIE	2015
72.	RICHARD A. COOLEY, Jr.	2011
	JOHN D. MONAGHAN	2013
	CYNTHIA SIEMEN PLATZER	2015
73A.	GREGORY S. ROSS	2015
73B.	DAVID B. HERRINGTON	2015
74.	JENNIFER CASS BARNES	2011
	TIMOTHY J. KELLY	2013
	DAWN A. KLIDA	2011
75.	STEVEN CARRAS	2011
	JOHN HENRY HART	2015
76.	WILLIAM R. RUSH	2015
77.	SUSAN H. GRANT	2015
78.	H. KEVIN DRAKE	2015
79.	PETER J. WADEL	2015
80.	JOSHUA M. FARRELL	2015
81.	ALLEN C. YENIOR	2015
82.	RICHARD E. NOBLE	2015
83.	DANIEL L. SUTTON	2015
84.	DAVID A. HOGG	2015
85.	BRENT V. DANIELSON	2015[8]
86.	JOHN D. FORESMAN	2011
	MICHAEL J. HALEY	2015
	THOMAS J. PHILLIPS	2013
87.	PATRICIA A. MORSE	2015
88.	THEODORE O. JOHNSON	2015
89.	MARIA I. BARTON	2015
90.	RICHARD W. MAY	2015
91.	ELIZABETH BIOLETTE CHURCH	2015
92.	BETH GIBSON	2015
93.	MARK E. LUOMA	2015
94.	GLENN A. PEARSON	2015
95A.	JEFFREY G. BARSTOW	2015
95B.	CHRISTOPHER S. NINOMIYA	2015
96.	DENNIS H. GIRARD	2011
	ROGER W. KANGAS	2015
97.	MARK A. WISTI	2015
98.	ANDERS B. TINGSTAD, Jr.	2015

[8] To February 28, 2011.

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2012
CARL F. JARBOE	2014
THEODORE A. METRY	2011
MATTHEW R. RUMORA	2014

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2013
Alger/Schoolcraft	CHARLES C. NEBEL	2011
Allegan	MICHAEL L. BUCK	2013
Alpena	THOMAS J. LaCROSS	2013
Antrim	NORMAN R. HAYES	2013
Arenac	RICHARD E. VOLLBACH, Jr.	2011
Baraga	TIMOTHY S. BRENNAN	2013
Barry	WILLIAM M. DOHERTY	2013
Bay	KAREN TIGHE	2013
Benzie	NANCY A. KIDA	2013
Berrien	MABEL JOHNSON MAYFIELD	2015
Berrien	THOMAS E. NELSON	2013
Branch	FREDERICK L. WOOD	2013
Calhoun	PHILLIP E. HARTER	2011
Calhoun	GARY K. REED	2013[1]
Cass	SUSAN L. DOBRICH	2013
Cheboygan	ROBERT JOHN BUTTS	2013
Chippewa	LOWELL R. ULRICH	2013
Clare/Gladwin	THOMAS P. McLAUGHLIN	2013
Clinton	LISA SULLIVAN	2013
Crawford	MONTE BURMEISTER	2013
Delta	ROBERT E. GOEBEL, Jr.	2013
Dickinson	THOMAS D. SLAGLE	2013
Eaton	THOMAS K. BYERLY	2011
Emmet/Charlevoix	FREDERICK R. MULHAUSER	2013
Genesee	JENNIE E. BARKEY	2015
Genesee	F. KAY BEHM	2011
Gogebic	JOEL L. MASSIE	2013
Grand Traverse	DAVID L. STOWE	2013
Gratiot	JACK T. ARNOLD	2013
Hillsdale	MICHAEL E. NYE	2013

[1] To April 1, 2011.

Houghton	FRASER T. STROME	2011
Huron	DAVID L. CLABUESCH	2013
Ingham	R. GEORGE ECONOMY	2013
Ingham	RICHARD JOSEPH GARCIA	2015
Ionia	ROBERT S. SYKES, JR.	2013
Iosco	JOHN D. HAMILTON	2013
Iron	C. JOSEPH SCHWEDLER	2013
Isabella	WILLIAM T. ERVIN	2013
Jackson	DIANE M. RAPPLEYE	2013
Kalamazoo	CURTIS J. BELL, JR.	2013
Kalamazoo	PATRICIA N. CONLON	2015
Kalamazoo	DONALD R. HALSTEAD	2011
Kalkaska	LYNNE MARIE BUDAY	2013
Kent	NANARUTH H. CARPENTER	2011
Kent	PATRICIA D. GARDNER	2013
Kent	G. PATRICK HILLARY	2013
Kent	DAVID M. MURKOWSKI	2015
Keweenaw	JAMES G. JAASKELAINEN	2013
Lake	MARK S. WICKENS	2013
Lapeer	JUSTUS C. SCOTT	2013
Leelanau	LARRY J. NELSON	2013
Lenawee	GREGG P. IDDINGS	2011
Livingston	CAROL HACKETT GARAGIOLA	2013
Luce/Mackinac	W. CLAYTON GRAHAM	2013
Macomb	KATHRYN A. GEORGE	2015
Macomb	PAMELA GILBERT O'SULLIVAN	2013
Manistee	THOMAS N. BRUNNER	2013
Marquette	MICHAEL J. ANDEREGG	2013
Mason	MARK D. RAVEN	2013
Mecosta/Osceola	MARCO S. MENEZES	2011
Menominee	WILLIAM A. HUPY	2013
Midland	DORENE S. ALLEN	2013
Missaukee	CHARLES R. PARSONS	2013
Monroe	FRANK L. ARNOLD	2013
Monroe	JOHN A. HOHMAN, JR.	2013
Montcalm	CHARLES W. SIMON, III	2013
Montmorency	JOHN E. FITZGERALD	2013
Muskegon	NEIL G. MULLALLY	2011
Muskegon	GREGORY C. PITTMAN	2013
Newaygo	GRAYDON W. DIMKOFF	2013
Oakland	LINDA S. HALLMARK	2013
Oakland	EUGENE ARTHUR MOORE	2011
Oakland	DANIEL A. O'BRIEN	2015
Oakland	ELIZABETH M. PEZZETTI	2011
Oceana	BRADLEY G. LAMBRIX	2013

Ogemaw	SHANA A. LAMBOURN	2013
Ontonagon	JANIS M. BURGESS	2011
Oscoda	KATHRYN JOAN ROOT	2013
Otsego	MICHAEL K. COOPER	2013
Ottawa	MARK A. FEYEN	2013
Presque Isle	DONALD J. McLENNAN	2013
Roscommon	DOUGLAS C. DOSSON	2013
Saginaw	FAYE M. HARRISON	2015
Saginaw	PATRICK J. McGRAW	2013
St. Clair	ELWOOD L. BROWN	2015
St. Clair	JOHN D. TOMLINSON	2013
St. Joseph	THOMAS E. SHUMAKER	2013
Sanilac	R. TERRY MALTBY	2013
Shiawassee	JAMES R. CLATTERBAUGH	2013
Tuscola	W. WALLACE KENT, JR.	2013[2]
Tuscola	AMANDA L. ROGGENBUCK	2013[3]
Van Buren	FRANK D. WILLIS	2013
Washtenaw	DARLENE A. O'BRIEN	2013
Washtenaw	NANCY CORNELIA WHEELER	2015
Wayne	JUNE E. BLACKWELL-HATCHER	2013
Wayne	FREDDIE G. BURTON, JR.	2013
Wayne	JUDY A. HARTSFIELD	2015
Wayne	TERRANCE A. KEITH	2015[4]
Wayne	MILTON L. MACK, JR.	2011
Wayne	CATHIE B. MAHER	2011
Wayne	MARTIN T. MAHER	2015
Wayne	DAVID J. SZYMANSKI	2015[5]
Wayne	FRANK S. SZYMANSKI	2013
Wexford	KENNETH L. TACOMA	2013

[2] To December 31, 2010.

[3] From December 31, 2010.

[4] From December 28, 2010.

[5] To December 21, 2010.

JUDICIAL CIRCUITS

County	Seat	Circuit
Alcona	Harrisville	26
Alger	Munising	11
Allegan	Allegan	48
Alpena	Alpena	26
Antrim	Bellaire	13
Arenac	Standish	34
Baraga	L'Anse	12
Barry	Hastings	5
Bay	Bay City	18
Benzie	Beulah	19
Berrien	St. Joseph	2
Branch	Coldwater	15
Calhoun	Marshall, Battle Creek	37
Cass	Cassopolis	43
Charlevoix	Charlevoix	33
Cheboygan	Cheboygan	53
Chippewa	Sault Ste. Marie.	50
Clare	Harrison	55
Clinton	St. Johns	29
Crawford	Grayling	46
Delta	Escanaba	47
Dickinson	Iron Mountain	41
Eaton	Charlotte	5
Emmet	Petoskey	33
Genesee	Flint	7
Gladwin	Gladwin	55
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	52
Ingham	Mason, Lansing.	30
Ionia	Ionia	8
Iosco	Tawas City	23
Iron	Crystal Falls	41
Isabella	Mount Pleasant.	21
Jackson	Jackson	4
Kalamazoo	Kalamazoo	9
Kalkaska	Kalkaska	46
Kent	Grand Rapids	17
Keweenaw	Eagle River	12
Lake	Baldwin	51
Lapeer	Lapeer	40
Leelanau	Leland	13
Lenawee	Adrian	39
Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	50
Macomb	Mount Clemens	16
Manistee	Manistee	19
Marquette	Marquette	25
Mason	Ludington	51
Mecosta	Big Rapids	49
Menominee	Menominee	41
Midland	Midland	42
Missaukee	Lake City	28
Monroe	Monroe	38
Montcalm	Stanton	8
Montmorency	Atlanta	26
Muskegon	Muskegon	14
Newaygo	White Cloud	27
Oakland	Pontiac	6
Oceana	Hart	27
Ogemaw	West Branch	34
Ontonagon	Ontonagon	32
Osceola	Reed City	49
Oscoda	Mio	23
Otsego	Gaylord	46
Ottawa	Grand Haven	20
Presque Isle	Rogers City	26
Roscommon	Roscommon	34
Saginaw	Saginaw	10
St. Clair	Port Huron	31
St. Joseph	Centreville	45
Sanilac	Sandusky	24
Schoolcraft	Manistique	11
Shiawassee	Corunna	35
Tuscola	Caro	54
Van Buren	Paw Paw	36
Washtenaw	Ann Arbor	22
Wayne	Detroit	3
Wexford	Cadillac	28

TABLE OF CASES REPORTED

(Lines set in small type refer to actions on application for leave to appeal from the Court of Appeals starting at page 851, and to special orders in other matters starting at page 1201.)

PAGE

A

ACE American Ins Co v Michigan Catastrophic Claims Ass'n 1040
ADCO Stratford Village North, Contract Supply Co, Inc v .. 871
AFSCME Council 25, Washtenaw Co v 1046
AFSCME Council 25 v Wayne Co 1008
AFSCME Local 3308, 36th Dist Court v 994
A1 South/Grand Rapids Griffins, Angel v 989
ASAMA Coldwater Mfg, Inc v Department of Treasury 873
Aaron, People v 1046
Abay v DaimlerChrysler Ins Co 979
Abbas, People v 1054
Abdullah, People v 1042
Aboudaya v Auto Club Ins Ass'n 947
Abron, People v 914
Aceval, People v 978
Acey v Consumers Energy Co 858
Adair v Utica Community Schools 1037
Adams, People v (Armel) 872
Adams, People v (Barry) 859
Adams, People v (Sirdarean) 863
Ader v Delta College Bd of Trustees 1025
Agelink, People v 1049
Agurs, People v 913
Aharauka, Allen v 954
Ahrens Construction, Inc, Miller-Davis Co v 875
Aiello, Brooklyn Plumbing Heating & Air Conditioning v ... 871

PAGE

Ajax Paving Industries v Vanopdenbosch Construction Co ... 1045
Akram, People v 1037
Al-Awadi, People v 1047
Alarie v Lopatin Miller, Freedman, Bluestone, Erlich, Rosen & Bartnick, PC 904
Albers, People v 1041
Alberta, People v 1038
Alcona Circuit Judge, Smith v 916
Alderman v J C Development Communities, LLC 873
Aleman, People v 869
Alexander, People v (Alex) 857
Alexander, People v (DeLeon) 869
Allard v Sova 1040
Allen v Aharauka 954
Allen v Belonga 891, 929
Allen v City of Laingsburg 862
Allen, People v (Anthony) 1041
Allen, People v (Damon) 914
Allen, People v (Deborah) 1042
Alley v Seck 868
Alliance for Children, Inc v Detroit Public Schools 1042
Allstate Ins Co, Bronson Methodist Hospital v 918
Allstate Property & Casualty Ins Co, Phelps Estate v 980
Alpena Probate Court, Mortimer v 916
Alpha Capital Management, Inc v Rentenbach 948
Alson, People v 913
Amador, People v 870
American Axle & Mfg Co, Curry v 949
American Axle & Mfg Holdings, Baldwin v 950
American Home Assurance Co v Michigan Catastrophic Claims Ass'n 1040
American Home Mortgage Servicing v Panko 1038
Ameristar Jet Charter, Inc, Hughes v 988
Ameristar Jet Charter, Inc, Patty v 988
Amerisure Mutual Ins Co v Hall Steel Co 863
Amparo, People v 1038
Amsted Industries, Inc, Wirth v 877
Anderson v Harleysville Ins Co 900
Anderson, People v (Darick) 1048
Anderson, People v (Dmitri) 1049

PAGE

Anderson, People v (Lequin) 1050
Anderson, People v (Neki) 871
Anderson, Riggs v 873
Anderson v State Farm Mutual Automobile Ins Co 865
Angel v A1 South/Grand Rapids Griffins 989
Anglers of the AuSable v Department of Environmental Quality 69
Ann Arbor Ceiling & Partition Co, Inc, Loweke v 876
Ann Arbor (City of), Handley v 851
Anonymous Joint Enterprise, Smith v 860
Arath II, Inc v Heukels County Drain Dist 994
Armstrong v Iosco Twp 854
Arnold, People v 1049
Atchinson, People v 995
Atek Thermoforming, Inc, Summit Polymers, Inc v 854
Atkins, People v 1045
Attorney Discipline Bd, Barkovic v 863
Attorney Discipline Bd, Dunchock v 860
Attorney Discipline Bd, MacDonald v 916
Attorney General v 54-A Dist Judge 1052
Attorney Grievance Comm, Bakian v 916
Attorney Grievance Comm, Brown v 1042
Attorney Grievance Comm, Burwell v 916
Attorney Grievance Comm, Froling v 997
Attorney Grievance Comm, Marshall v 950
Attorney Grievance Comm, McCreary v 873
Attorney Grievance Comm, Schmidt v 858
Attorney Grievance Comm, Spillane v 950
Attorney Grievance Comm, Tindall v 1036
Attorney Grievance Comm, Tyson v 1052
August, People v 995
Austin, People v 913
Auto Club Ins Ass'n, Aboudaya v 947
Auto Club Ins Ass'n, Dumas v 904
Auto Club Ins Ass'n, Mason v 996
Auto Club Ins Ass'n v Scott 1049
Auto-Owners Ins Co, Calderon v 984
Auto Owners Ins Co, Everett v 992
Auto-Owners Ins Co v Ferwerda Enterprises, Inc 917, 1051

PAGE

Awry Enterprises, Inc, JSB Enterprises v 974

B

Babel, 2000 Baum Family Trust v 136
Bacon, People v 993
Bailey, People v (Antonio) 1045
Bailey, People v (Sammie) 953
Baker, People v (Donnie) 870
Baker, People v (Jeffrey) 916
Baker, People v (Samuel) 914
Baker v Trans-Porte, Inc 924
Bakian v Attorney Grievance Comm 916
Baldwin v American Axle & Mfg Holdings 950
Balfour, People v 1047
Ball, People v 872
Ballard, People v 1049
Banks, People v 1038
Barachkov v 41-B Dist Court 1035
Barkley, People v 901
Barkovic v Attorney Discipline Bd 863
Barkway, Tabbert v 873
Barnard, People v 911
Barnes, People v (Michael) 915
Barnes, People v (Timothy) 869
Barron, People v 1046
Barrow v Detroit Mayor 1051
Bass, People v 872
Bassin, People v 1041
Bay Regional Medical Center, Michigan Cardiovascular Institute v 855
Baybest Ribs, LLC, Pray v 979
Beach, People v 947
Bean, People v (Amanda) 870
Bean, People v (Rafael) 1046
Beck, *In re* 6
Beck, People v 994
Beckem, People v 954
Beene, People v 995

PAGE

Belcher, People v 871
Belin, People v 1047
Bell, People v (Anthony) 872
Bell, People v (Brandon) 1048
Bell, People v (Lester) 870
Bell, People v (Tyrone) 947
Belonga, Allen v 891, 929
Bendure & Thomas v Golden 949
Bennett, People v 913
Benson v Vanderbeke 910
Benton Harbor (City of), Drake v 861, 1037
Bernard, People v 980
Bernardo, People v 857
Bernoudy, People v 914
Berry, People v (Anton) 1050
Berry, People v (Mervin) 900
Bethany Lutheran Church v Porter 1049
Beydoun, Home-Owners Ins Co v 915
Bezeau v Palace Sports & Entertainment, Inc 874, 891, 904
Bingham Twp, Schellenberg v 871, 997
Binyard, People v 1040
Bloomfield Financial Group v Haskins 900, 1051
Blue Harvest, Inc v Department of Transportation 900
Blue Lake Fine Arts Camp v Blue Lake Twp Zoning Bd of Appeals 887
Blue Lake Twp Zoning Bd of Appeals, Blue Lake Fine Arts Camp v 887
Blue River Financial Group, Inc v TBI Enterprises, LLC . 1047
Blue Water Village East, Solomon v 1053
Board of Ed, Wyoming Public Schools, Pittman v 862
Board of Law Examiners, Hakim v 1010
Bodrie v Tuscola Circuit Court 948
Bollore SA, Mackie v 853
Boone v Papanek 1050
Boonsiri, Hoffman v 1048
Boris, People v 915
Bossert, People v 1040
Bradford, Wilhelmi v 851
Bradley, People v 1039

PAGE

Brady, People v 855
Brake, People v 1042
Branion, People v 1048
Brannon, People v 951
Bratcher, *In re* 988
Breeding, People v (Andrew) 853, 997
Breeding, People v (Terry) 950
Briggs, People v (Kevin) 857
Briggs, People v (Winston) 948
Brigham, People v 1048
Bronson Methodist Hospital v Allstate Ins Co 918
Brooklyn Plumbing Heating & Air Conditioning v Aiello 871
Brooks, People v (Jeremiah) 854
Brooks, People v (Rodreckis) 1049
Brooks, People v (Tenora) 1041
Browder, People v 995
Brown v Attorney Grievance Comm 1042
Brown, People v (Fredrick) 913
Brown, People v (George) 1040
Brown, People v (Rosalind) 872
Brown, People v (Symone) 914
Brown, People v (Timothy) 857
Brown, People v (Tony) 1045
Brown, People v (William) 1047
Brown (Carlton) v Department of Corrections 911, 1042
Brown (Erick) v Department of Corrections 1047
Broyles, People v 855
Bruns v Kent Circuit Judge 873
Bryant, People v 855
Buchanan, People v (Kevin) 914
Buchanan, People v (Ricky) 1040
Buckner, People v 859
Burdick, People v 871
Burke v United American Acquisitions & Management, Inc 1035
Burley, People v 1045
Burnett, People v 948
Burnett v Ulrich 954, 1052
Burns International Security Services Corp, Delay v 873

PAGE

Burt v Department of Treasury 1047
Burwell v Attorney Grievance Comm 916
Busch, People v 873
Butler v Wayne County 1055

C

CMS Energy Corp, Dutton Partners v 1048
CW, *In re* 935
Cadarette, People v 871
Cage, People v 996
Calderon v Auto-Owners Ins Co 984
Calhoun, People v 1049
Calkins, People v (Gerald) 869
Calkins, People v (Isaiah) 996
Calloway, People v 914
Caminata, People v 1042
Camp, People v 1040
Campbell, People v 891
Cannon, People v 995
Cape to Cairo, Edwards v 921, 1051
Capelli v Capelli 935
Capital Area Transportation Auth, Tucker v 950
Cardiovascular Clinical Associates, Driver v 957
Carlson, People v 997
Carpenter, People v 884
Carreker, People v 868
Carrodine, People v 872, 997
Carter, People v (Deshawn) 1048
Carter, People v (Keith) 949
Carter, People v (Leonard) 913
Carter, People v (Rodney) 925, 1051
Carter, People v (Shelton) 1048
Casey, People v 1027
Castillo, People v 995
Catholic Diocese of Lansing, Weichuhn v 852
Catro v Underwood Property Management Co 949
Cell, *In re* 945
Celley, People v 1039
Center for Forensic Psychiatry, Warner v 862

PAGE

Centex Real Estate Corp, Madley v 914
Certified Question, *In re* 1
Certified Question From the United States Dist Court for the Eastern Dist of Michigan, *In re* (Waeschle v Oakland County Medical Examiner) 993
Cervi, People v 950
Chaban v Getsinger 1045
Chaney, People v 1050
Chapman, People v (Jeffrey) 947
Chapman, People v (Keith) 1039
Chapman, People v (Robert) 949
Chappell, People v 995
Charlevoix (City of), Klooster v 289
Charter Communications Holding Co, Recker v 907
Chase, People v 1039
Chase v Pomilia 911
Chase Home Finance, Iacobescu v 915
Chelsea (City of), Chelsea Investment Group LLC v 994
Chelsea Investment Group LLC v City of Chelsea 994
Childs, People v 1049
Christie v Fick 924
Chu, People v 870, 997
Ciena Health Care Management, Pragasam v 1051
Cistrunk v Oakwood Heritage Hospital 992
Cistrunk, People v 1048
CitiFinancial Mortgage Corp, Patterson v 1039
Citizens Bank, McDonald Ford, Inc v 1042
Citizens for Environmental Inquiry v Department of Environmental Quality 853
Citizens Ins Co, Miller v 1034
Citizens Ins Co, Ondrus v 887
City of Ann Arbor, Handley v 851
City of Benton Harbor, Drake v 861, 1037
City of Charlevoix, Klooster v 289
City of Chelsea, Chelsea Investment Group LLC v 994
City of Detroit v Crown Enterprises, Inc 856
City of Detroit, Williams v 889
City of Detroit, Wolf v 875

PAGE

City of Ecorse, Shaw v 852
City of Flint, Hovanec v 1009
City of Flint, Vemulapalli v 873
City of Laingsburg, Allen v 862
City of Romulus, Crown Enterprises, Inc v 1025
City of Royal Oak, LaMeau v 1052
City of Sterling Heights, Paige v 872
City of Troy, Kocenda v 857
Clardy, People v 947
Clark, People v (Dennis) 875
Clark, People v (Robert) 913
Clark v Swartz Creek Community Schools 993
Claudio, People v 853
Clay, People v 1047
Clear Channel Broadcasting, Hansknecht v 1041
Coca-Cola Enterprises Inc, Warren v 1049
Coches, People v 1041
Cohen, Hall v 947
Cohen v Nerenberg 872
Colaianni v Stuart Frankel Development Corp, Inc 1019
Cole, People v 873
Coleman, People v 912
Collins, People v 1048
Color Mini Camera, People v 1041
Colwell, People v 870
Community Health (Dep't of), Erber v 873
Comprehensive Rehabilitation Center, Moyer v 1042
Computer Business World, LLC v Thomas 1047
Coney, People v 1046
Conklin, People v 1038
Conner, People v 996
Consolidated Roadhouse of Taylor, LLC, Schooley v 981
Consumers Energy Co, Acey v 858
Contempt of Holland, *In re* 900
Contempt of Wayne County Clerk, *In re* 1008
Contract Supply Co, Inc v ADCO Stratford Village North 871
Cooper, Miller v 909
Cooper, Wells Fargo Bank, NA v 1039

PAGE

Cordle, Patreka v 908
Corona Construction, Inc v Gray 949
Corr, People v 946
Correa, People v 989
Corrections (Dep't of), Brown (Carlton) v 911, 1042
Corrections (Dep't of), Brown (Erick) v 1047
Corrections (Dep't of), Gill v 948
Corrections (Dep't of), Hawkins v 981
Corrections (Dep't of), Lewis v 914
Corrections (Dep't of), McCrate v 915
Corrections (Dep't of), Whitehorn v 854
Corrion, People v 1038, 1041, 1042
Corso, People v 948
Cotrill v Senter 908
Coulter v General Motors Corp 900
County Rd Ass'n of Michigan v Governor 877, 1019
Court of Appeals Clerk, Fergeanu v 853
Cousino, People v 854, 995
Craig, People v 861
Crandall v Oakwood Health Care, Inc 888
Crawford, People v 852
Creek, People v 1050
Crosby, People v 856
Crosthwaite, People v 1040
Crowe, People v 910
Crown Enterprises, Inc, City of Detroit v 856
Crown Enterprises, Inc v City of Romulus 1025
Cruz, People v 994
Cumulus Broadcasting, LLC v Keady 871
Cunningham, Jones-Collier v 1031
Cunningham, People v 858
Curry v American Axle & Mfg Co 949

D

DaimlerChrysler Corp, Findley v 1034
DaimlerChrysler Corp, Jones v 1036
DaimlerChrysler Corp, Kucharczyk v 857
DaimlerChrysler Ins Co, Abay v 979
Daniels, People v 874

PAGE

Daniels v Petrosky-Clark 864
Darrough, People v 1040
Davenport v Mosholder 1027
Davenport, People v 1054
Davidson, People v 854
Davis, People v (Andre) 915
Davis, People v (Charles) 852
Davis, People v (David) 1039
Davis, People v (Deontae) 946
Davis, People v (Matthew) 915
Davis, People v (Michael) 1049
Davis, People v (Todd) 871
Dawson, People v 995
Dayson, People v 1050
Decker v Stoiko 947
Deckers v Miller 904
DeJesus, People v 1046
Delay v Burns International Security Services Corp 873
Delta College Bd of Trustees, Ader v 1025
Department of Community Health, Erber v 873
Department of Corrections, Brown (Carlton) v 911, 1042
Department of Corrections, Brown (Erick) v 1047
Department of Corrections, Gill v 948
Department of Corrections, Hawkins v 981
Department of Corrections, Lewis v 914
Department of Corrections, McCrate v 915
Department of Corrections, Whitehorn v 854
Department of Environmental Quality, Anglers of the AuSable v 69
Department of Environmental Quality, Citizens for Environmental Inquiry v 853
Department of Environmental Quality, Martel v 949
Department of Human Services, Loar v 860
Department of Human Services, Schreur v 1042
Department of Natural Resources, Duffy v 861
Department of Transportation, Blue Harvest, Inc v 900
Department of Transportation, McCue v 954
Department of Transportation, Plunkett v 1055
Department of Treasury, ASAMA Coldwater Mfg, Inc v ... 873

PAGE

Department of Treasury, Burt v 1047
Department of Treasury, Ford Motor Co v 1026
Department of Treasury, Midwest Bus Corp v 992
Department of Treasury, ONE's Travel v 994
Deputy, People v 913
Derry v Derry 1010
Detroit (City of) v Crown Enterprises, Inc 856
Detroit (City of), Williams v 889
Detroit (City of), Wolf v 875
Detroit Mayor, Barrow v 1051
Detroit Medical Center & Sinai-Grace Hospital, Jones v .. 1036
Detroit Public Schools, Alliance for Children, Inc v 1042
Detroit Public Schools, Harris v 853, 997
DeWitt Landing & Dock Ass'n, Pine Bluffs Area Property Owners Ass'n, Inc v 947
Dextrom v Wexford County 853
Dickens, People v 1046
Dienhert, People v 1039
Dietrich, Tiernan v 954
Dillard v Farm Bureau General Ins Co 853
Dillard, People v 872
Dirla v Seney Spirit Store & Gas Station 888
Ditta, People v 1040
Dixie Cut Stone & Marble, Inc, Wolfgang v 887
Dixon, People v (Darius) 857
Dixon, People v (Hamin) 948
Dixon, People v (Joseph) 852
Dobrowski v Jay Dee Contractors, Inc 862
Dobson-McComber Agency, Inc, National Ass'n of Investors Corp v 1038
Doe v Doe 995
Doers, People v 1046
Dolly-McGlothlin, People v 872
Donald K Egelus Living Trust, *In re* 1048
Doolen, Pschigoda v 1030
Doss, People v 949
Doughrity, People v 872, 997
Downs, People v 1045
Drake v City of Benton Harbor 861, 1037

PAGE

Driver v Cardiovascular Clinical Associates 957
Droste, People v 1041
Druzynski, People v 1055
Dudley, *In re* 1030
Duffiney v Home Owners Ins Co 1049
Duffy v Department of Natural Resources 861
Dukes, People v 914
Dumas v Auto Club Ins Ass'n 904
Dumas v Miller 1009
Duncan, People v 993
Duncan v State of Michigan 957, 1011, 1019
Dunchock v Attorney Discipline Bd 860
Dunlap, People v (Danny) 859
Dunlap, People v (Darnell) 1041
Dunn v Matatall 980
Dupree, People v 860
Duray Development v Perrin 994
Dutton Partners v CMS Energy Corp 1048
Dziadziola v Miller 904

E

Ecorse (City of), Shaw v 852
Edw C Levy Co v Marine City Bd of Zoning Appeals 868
Edwards v Cape to Cairo 921, 1051
Edwards, People v 997
Elliott, People v 1039
Elliott v Therrien 869
Emmet County Bd of Comm'rs, Miller Apple Ltd Partnership v 887
EnGenius, Inc v Ford Motor Co 1052
Environmental Quality (Dep't of), Anglers of the AuSable v 69
Environmental Quality (Dep't of), Citizens for Environmental Inquiry v 853
Environmental Quality (Dep't of), Martel v 949
Erber v Department of Community Health 873
Ericksen, People v 1045
Ertman, People v 1046

PAGE

Ervin, People v 852
Escobar, People v 1046
Estate of Doyle, Garcia v 906
Esurance Ins Co, Henry Ford Health System v 1026
Etherton, People v 911
Evans v Grosse Pointe Public School System 861
Evans, People v (Lamar) 924
Evans, People v (Riley) 948
Everett v Auto Owners Ins Co 992
Executive Property Development v Nautilus Ins Co 1041

F

FIA Card Services, N A v Selim 869
Fairchild, People v 947
Fanning v William Beaumont Hospital 869
Farm Bureau General Ins Co, Dillard v 853
Farm Bureau Mutual Ins Co, Healing Place, Ltd v 1026
Farm Bureau Life Ins Co of Michigan, McCoy v 1048
Farmers Ins Exch v Young 980
Farraj, People v 855
Farrow, People v 1047
Favorite, People v 915
Fender, State Treasurer v 1039
Fergeanu v Court of Appeals Clerk 853 1051
Ferwerda Enterprises, Inc, Auto-Owners Ins Co v 917, 1051
Feyz v Mercy Memorial Hospital 852, 950
Fick, Christie v 924
54-A Dist Judge, Attorney General v 1052
Finch, People v 948
Findley v DaimlerChrysler Corp 1034
Findling v Parker 1047
Finley, People v 1049
Finley v Sam's Club 857
Fitzsimons, People v 853
Fleming, People v 914
Fleming v Rice 924
Flint (City of), Hovanec v 1009
Flint (City of), Vemulapalli v 873
Flowers, People v 870

PAGE

Flowers v Progressive Michigan Ins Co 1035
Forbes, People v 1050
Ford v National Church Residences, Inc 924
Ford Motor Co v Department of Treasury 1026
Ford Motor Co, EnGenius, Inc v 1052
41-B Dist Court, Barachkov v 1035
Foster, People v 1045
Fouts, People v 996
Fowler v Jack's Corner Stores 1039
Fox, People v 1049
Frank, People v 913
Frederick, People v 996
Freeman, People v 995
Freemon, People v 871
French, People v 1010
Friedman, People v 1047
Froling v Attorney Grievance Comm 997
Fruitman v Rubinstein 869
Fry, *In re* 860
Frye, People v (Adonis) 856
Frye, People v (Richard) 885
Fyda, People v 948

G

Gaitan v Lakeshore Habitat for Humanity, Inc 863
Galafati, People v 913
Gamble, People v 1049
Garcia v Estate of Doyle 906
Garcia, People v (Alex) 911
Garcia, People v (Carlos) 949
Geborkoff, People v 980
Geico Indemnity Co v Goldstein 951
Gelil, *In re* 1042
Genaw v Genaw 997
General Motors Corp, Coulter v 900
General Motors Corp, Harris v 899
General Motors Corp, Kingmartin v 1055
Genesee County Treasurer v Holman 915
Genesys Regional Medical Center, Jedrzejas v 1027

PAGE

Gentile, People v (Joseph) 952
George, People v (Jarron) 954
George, People v (Michael) 877
Getsinger, Chaban v 1045
Gibson, People v (Gregory) 1047
Gibson, People v (Shad) 980
Gill v Department of Corrections 948
Gilliard, People v 954
Gillis, People v 887
Gilmore, People v 949
Globe, People v 995
Glore, Lavigne v 1048
Glover, People v 1038
Golden, Bendure & Thomas v 949
Goldstein, Geico Indemnity Co v 951
Golf Services, LLC, Zadrzynski v 1065
Gonzales, People v 1045
Gonzalez, People v 852
Gooding, People v 914
Gordon-Nix, People v 994
Gorecki, People v 992
Goss, People v 1045
Governor, County Rd Ass'n of Michigan v 877, 1019
Graham-Jones, People v 996
Grandberry, People v 996
Gratton, People v 912
Graves, People v 1050
Graves v State Farm Mutual Ins Co 984
Gray, Corona Construction, Inc v 949
Great Atlantic & Pacific Tea Co, Inc, Thorne v 884
Green, People v (Reginald) 912
Green, People v (Robert) 856
Green v Pierson 876
Greer, People v 1039
Griesemer, People v 1040
Grievance Administrator v Miller 883
Grievance Administrator v Musilli & Baumgardner 979
Grievance Administrator v Radulovich 1039
Grievance Administrator v Toca 995

PAGE

Griffin, People v 914
Grissom, People v 1031
Grosse Pointe Public School System, Evans v 861

H

Hackworth, People v 915
Hadden v McDermitt Apartments, LLC 945
Haeger, People v 1033
Hailey, People v 1032
Hakim v Board of Law Examiners 1010
Halcomb, People v 994
Hall v Cohen 947
Hall, People v (Ernest) 870
Hall, People v (William) 853
Hall Steel Co, Amerisure Mutual Ins Co v 863
Hammonds, People v 950
Hampton, People v (Aguilar) 996
Hampton, People v (Andre) 855
Hampton, People v (Kanyama) 1045
Handley v City of Ann Arbor 851
Hankins, People v (Robert) 915
Hankins, People v (Torantie) 873
Hansknecht v Clear Channel Broadcasting 1041
Hardy, People v (David) 951
Hardy, People v (James) 916
Harleysville Ins Co, Anderson v 900
Harrington, People v 859
Harris v Detroit Public Schools 853, 997
Harris v General Motors Corp 899
Harris, People v (Freddie) 856
Harris, People v (Rhashi) 1046
Harris, People v (Rodney) 996, 1052
Harris, People v (Scott) 955
Harrison, People v 993
Hart, People v (Donald) 951
Hart, People v (Edward) 952
Hartman, People v (Mark) 871, 997
Haskins, Bloomfield Financial Group v 900, 1051
Hawkins v Department of Corrections 981

PAGE

Hawkins, People v 1035
Haynes, People v 995
Hayward, People v 1040
Healing Place, Ltd v Farm Bureau Mutual Ins Co 1026
Heibel, People v 948
Heise, People v 856
Henderson, People v (Kenneth) 1050
Henderson, People v (Paul) 1039
Henry, People v 914
Henry Ford Health System v Esurance Ins Co 1026
Hercules-Lopez, People v 995
Heritage in the Hills Homeowners Ass'n v Heritage of Auburn Hills LLC 980
Heritage of Auburn Hills LLC, Heritage in the Hills Homeowners Ass'n v 980
Hernandez, People v 859
Herp, People v 995
Heukels County Drain Dist, Arath II, Inc v 994
Hicks, People v 1049
Hierholzer, People v 1050
Hill v Johnson 1047
Hill, People v (Edward) 1049
Hill, People v (Kevin) 951
Hill, People v (Marcus) 871
Hill, People v (Naykima) 862
Hill Twp, Studley v 988
Hills & Dales General Hospital v Oxholm-Dababneh 948
Hinsberg v Hinsberg 1047
Hinton, People v 900
Hlywa v Liberty Park of America 949
Hobbs, People v 954
Hodge, People v 1050
Hoffman v Boonsiri 1048
Hoggard, People v 996
Holcomb, People v 856
Hollingsworth, People v 949
Holloway, People v 887
Holman, Genesee County Treasurer v 915
Holmes, People v (Michael) 854

PAGE

Holmes, People v (Quintin) 855
Holmes, People v (Roy) 1041
Home Office Realty, Voelker v 996
Home-Owners Ins Co v Beydoun 915
Home Owners Ins Co, Duffiney v 1049
Home-Owners Ins Co, Krohn 876
Home-Owners Ins Co, National General Ins Co v 948, 1051
Hopkins, People v 1041
Horton, People v 911
Horvath v Johnson 968, 1030
Hovanec v City of Flint 1009
Howard, People v (Bobby) 995
Howard, People v (Connell) 853
Howell, Majors v 980
Howell Bd of Ed, Howell Ed Ass'n v 1010
Howell Ed Ass'n v Howell Bd of Ed 1010
Hudson, People v (Allen) 913
Hudson, People v (David) 871
Hudson, People v (Jonathon) 858
Hughes v Ameristar Jet Charter, Inc 988
Hughes, People v 857
Hull, People v 912
Human Services (Dep't of), Loar v 860
Human Services (Dep't of), Schreur v 1042
Hunt, Joseph Chevrolet, Inc v 948
Hunt, People v 995
Hurd, People v (Demetrius) 855
Hurd, People v (Tony) 1035
Hurn, People v 862
Hurt, Tus v 980
Huston, People v 876
Hutter, People v 981

I

Iacobescu v Chase Home Finance 915
Imelmann, People v 872
In re Beck 6
In re Bratcher 988
In re CW 935

PAGE

In re Cell 945
In re Certified Question 1
In re Certified Question From the United States Dist Court for the Eastern Dist of Michigan (Waeschle v Oakland County Medical Examiner) 993
In re Contempt of Holland 900
In re Contempt of Wayne County Clerk 1008
In re Donald K Egelus Living Trust 1048
In re Dudley 1030
In re Fry 860
In re Gelil 1042
In re Investigative Subpoenas 1032
In re Kadzban 862, 950
In re Kennedy 859
In re Marcotte Minors 1010
In re Nordberg 864
In re O'Berry 934
In re PM 891
In re Parole of Elias 1034
In re Payne/Darling/Wright Minors 1042
In re People v Larry King 924
In re Priscilla M Ward Revocable Trust 1051
In re Rinke Estate 1048
In re Sessions 994
In re Smith/Tyson Minors 1037
In re Smyth 932
In re Sorrell 903
In re Stillson Estate 993
In re Upjohn Estate 862
In re Vales 929
Investigative Subpoenas, *In re* 1032
Iosco Twp, Armstrong v 854
Isom, People v 854
Ivey, People v 1009

J

J C Development Communities, LLC, Alderman v 873
JNCC, LLC v Metropolitan Title Co 950
JP Morgan Chase Bank, Kabala v 948

PAGE

JSB Enterprises v Awry Enterprises, Inc 974
Jack's Corner Stores, Fowler v 1039
Jackson, People v (Daniel) 954
Jackson, People v (Dennis) 857
Jackson, People v (Dremaris) 872
Jackson, People v (Maurice) 859
Jacobs, People v (Jackson) 1040
Jacobs, People v (Nathan) 851
Jahn, People v 913
Jakaj, People v 851
Jamison, People v 851
Jastifer v Jastifer 981
Jay, People v 915
Jay Dee Contractors, Inc, Dobrowski v 862
Jedrzejas v Genesys Regional Medical Center 1027
Jen-Tech Corp, Poly Bond Inc v 1048
Jenkins, People v (Germaine) 1039
Jenkins, People v (Marquis) 852
Jenkins, People v (Nathaniel) 1045
Jennings, People v 870
Jewell, People v 871
Jilek v Stockson 1053
Johanson, People v 875
John Guidobono II Revocable Trust Agreement v Jones 989, 1051
Johnson, Hill v 1047
Johnson, Horvath v 968, 1030
Johnson, People v (Brian) 856, 1046
Johnson, People v (Charles) 854
Johnson, People v (Dale) 1047
Johnson, People v (Damien) 872
Johnson, People v (David) 1047
Johnson, People v (Duane) 870
Johnson, People v (Larry) 915
Johnson, People v (Mario) 946
Johnson, People v (Michael) 860, 1038
Johnson, People v (Raymond) 914
Johnson, People v (Ronnell) 859
Johnson, People v (Terence) 869

PAGE

Johnson v Wausau Ins Co 907
Jones v DaimlerChrysler Corp 1036
Jones v Detroit Medical Center & Sinai-Grace Hospital ... 1036
Jones, John Guidobono II Revocable Trust
Agreement v 989, 1051
Jones, People v (Anthony) 852, 1030
Jones, People v (Bobbie) 913
Jones, People v (Elroy) 855
Jones, People v (Garry) 913
Jones, People v (James) 915
Jones, People v (John) 1031
Jones, People v (Joshua) 852
Jones, People v (Michael) 1050
Jones, People v (Samuel) 1045
Jones, People v (Scott) 871
Jones, People v (Willie) 915
Jones-Collier v Cunningham 1031
Jordan, People v (Ajene) 1046
Jordan, People v (Anthony) 854
Jordan, People v (Pierre) 857
Joseph Chevrolet, Inc v Hunt 948

K

KSK Hospitality Group, Inc, Kacho v 888
Kabala v JP Morgan Chase Bank 948
Kacho v KSK Hospitality Group, Inc 888
Kadzban, *In re* 862, 950
Kalamazoo County Rd Comm, Oshtemo Charter Twp v ... 994
Kamp, People v 1049
Kane, Stout Tool Corp v 869
Kantrow, Mikolasik v 1040
Kasson Twp, Kyser v 860
Katz v Riverwood Subdivision Homeowners Ass'n 995
Keady, Cumulus Broadcasting, LLC v 871
Keith, People v 914
Kennedy, *In re* 859
Kennedy, People v 869
Kent Circuit Judge, Bruns v 873
Keyes, People v 1045

PAGE

Keys, People v 1046
King v Oakland County Prosecutor 858
King v State of Michigan 208
Kingmartin v General Motors Corp 1055
Kircos v Waslawski 947, 1051
Kissner, People v 852
Klait, People v 900
Kloian v VanFossen 911
Klooster v City of Charlevoix 289
Knapp, People v 922
Knepper, People v 1048
Knox, People v 995
Kocenda v City of Troy 857
Koch, People v 854
Kolbucaj, People v 873
Komolmis, People v 1025
Kowalski, People v 953
Krohn v Home-Owners Ins Co 876
Kucharczyk v DaimlerChrysler Corp 857
Kurtz, People v 863
Kyles, People v 854
Kyser v Kasson Twp 860

L

LaForest, People v 1039
LaFrance, People v 949
Laingsburg (City of), Allen v 862
Lakeshore Habitat for Humanity, Inc, Gaitan v 863
LaMeau v City of Royal Oak 1052
Land v L'anse Creuse Public Schools Bd of Ed 913
L'anse Creuse Public Schools Bd of Ed, Land v 913
Larkin, People v 949
Larkins, People v 1050
Laroe, People v 1047
LaRose, People v 1047
LaSalle Bank Midwest v Zlatkin 913, 1051
Lavigne v Glore 1048
Lawson, Moody v 954
Ledingham, Martin v 987

PAGE

Lee, People v (Johnny) 912
Lee, People v (Kent) 953
Lee, Plaggemeyer v 907
Lennen v Lennen 871
Leonard, People v 916
Levaine v R J Tower Corp 996
Levine v Monroe County Emergency Medical Auth 1048
Levosinski, McManigal v 906
Lewis v Department of Corrections 914
Lewis, People v (Charles) 911
Lewis, People v (Darquese) 1038
Liberty Park of America, Hlywa v 949
Likine, People v 955
Linden v St John Hospital 954
Livingston v West Michigan Lakeshore Ass'n of Realtors 913
Loar v Department of Human Services 860
Lockwood, People v 951
Lofton, People v (Darryl) 924
Lofton, People v (Timothy) 855
Lopatin Miller, Freedman, Bluestone, Erlich, Rosen & Bartnick, PC, Alarie v 904
Lopatin Miller, Freedman, Bluestone, Erlich, Rosen & Bartnick, PC, Nyland v 904
Lott, People v 911
Love, People v (Jaquan) 1048
Love, People v (Larry) 1039
Loweke v Ann Arbor Ceiling & Partition Co, Inc 876
Lown, People v 242
Lubienski v Scio Twp 854
Lucero, People v 1038
Lysyuk, People v 910
Lyvere, People v 855

M

Mabins, People v 949, 1052
MacDonald v Attorney Discipline Bd 916
Mack, People v 1038

PAGE

Mackenzie's Animal Sanctuary, Inc, Ward-Tenbroeke v 910
Mackie v Bollore SA 853
Macomb County Prosecutor v Osantowski 952
Macomb Twp, Sal-Mar Industrial Corp v 1049
Madley v Centex Real Estate Corp 914
Magee, People v 1039
Maher v Maher 874
Majors v Howell 980
Maleckas, People v 1040
Malik, People v 1055
Malone, People v 947
Mann, Quality Mfg, Inc v 1045
Manzella, People v 854
Marcotte Minors, *In re* 1010
Marine City Bd of Zoning Appeals, Edw C Levy Co v 868
Marshall v Attorney Grievance Comm 950
Marshall Medical Associates, Myers v 992
Martel v Department of Environmental Quality 949
Martin v Ledingham 987
Martin, People v 1038
Martinez, People v 1047
Mary A & Edward P O'Halloran Trust, Putruss v 1048
Mason v Auto Club Ins Ass'n 996
Mason, People v 1039
Masters v Masters 853
Matatall, Dunn v 980
Mateo-Castellanos, People v 855
Maxey, People v 871
May v Titan Ins Co 862
Mayes, People v (Dominique) 994
Mayes, People v (Leslie) 873
Mayweather, People v 870
Mazak, People v 1048
McBurney, People v 858
McCarthy v Scofield 1030
McCarthy v Sosnick 858, 998, 1030
McClinton, People v 949
McCloud, People v 1038
McConeghy, People v 872

PAGE

McCormick v McCormick 994
McCormick, People v 856
McCoy v Farm Bureau Life Ins Co of Michigan 1048
McCoy, People v 914
McCrate v Department of Corrections 915
McCreary v Attorney Grievance Comm 873
McCue v Department of Transportation 954
McDermitt Apartments, LLC, Hadden v 945
McDonald, People v (Scott) 1050
McDonald, People v (Terry) 1049
McDonald Ford, Inc v Citizens Bank 1042
McDowell, People v 872
McKinney, People v 1054
McLemore, People v 995
McManigal v Levosinski 906
McManus v Toler 1027
McMillan, People v 911
McMullan, People v 922
McMurray, People v 949
McNichols Real Estate, LLC, Saveway Food Center, Inc v ... 915
McQuillan, People v 913
Meade, People v 869
Meadows v Meadows 911, 1051
Melbert, People v 913
Memminger, People v 1045
Mercy Memorial Hospital, Feyz v 852, 950
Meredith v Oakwood Healthcare, Inc 1035
Merriweather, People v 1038
Metropolitan Title Co, JNCC, LLC v 950
Michigan AFSCME Council 25 v Wayne County 864
Michigan AFSCME Council 25 v Woodhaven-Brownstown School Dist 974
Michigan Basic Property Ins Ass'n v Office of Financial & Ins Regulation 1034
Michigan Cardiovascular Institute v Bay Regional Medical Center 855
Michigan Catastrophic Claims Ass'n, ACE American Ins Co v 1040
Michigan Catastrophic Claims Ass'n, American Home Assurance Co v 1040

PAGE

Michigan Ed Ass'n v Secretary of State 18
Michigan Ins Co, Morris v 872
Middlebrook, People v 869
Midmichigan Medical Center, Zunich v 863
Midwest Bus Corp v Department of Treasury 992
Mikolasik v Kantrow 1040
Milford Housing, LLC v Village of Milford 854
Miller v Citizens Ins Co 1034
Miller v Cooper 909
Miller, Deckers v 904
Miller, Dumas v 1009
Miller, Dziadziola v 904
Miller, Grievance Administrator v 883
Miller, People v (Andrew) 1038
Miller, People v (Carl) 995
Miller, People v (Jeffrey) 872
Miller, People v (Marvin) 992
Miller, People v (Stanley) 852
Miller Apple Ltd Partnership v Emmet County Bd of Comm'rs 887
Miller-Davis Co v Ahrens Construction, Inc 875
Mitchell, People v 853
Mizori, People v 854
Monk, People v 859
Monroe County Emergency Medical Auth, Levine v 1048
Moody v Lawson 954
Moore, People v (Anthony) 914
Moore, People v (Christopher) 1046
Moore, People v (Gacolby) 946
Moore, People v (Mark) 1047
Moore, People v (Maurice) 872
Moore, People v (Raymond) 1038
Moore, People v (Tyrone) 852
Moore, People v (Willie) 950
Moothart v Secretary of State 1035
Moran v Roy 857
Moreno, People v 1010
Morgan, People v 922
Morris v Michigan Ins Co 872
Morrison, People v 1035

PAGE

Mortimer v Alpena Probate Court 916
Mosher, People v 947
Mosholder, Davenport v 1027
Moyer v Comprehensive Rehabilitation Center 1042
Moyer, People v 996
Mozingo, People v 1045
Mullins, People v 910
Mungo, People v 920
Murray, People v 1038
Musilli & Baumgardner, Grievance Administrator v 979
Myers v Marshall Medical Associates 992

N

Napier, People v 1046
Nash, People v (Freddie) 911
Nash, People v (Tenicia) 950
Nassar, World Savings Bank v 874
National Ass'n of Investors Corp v Dobson-McComber Agency, Inc 1038
National Church Residences, Inc, Ford v 924
National General Ins Co v Home-Owners Ins Co 948, 1051
Nationwide Ins Co, Sexton-O'Brien v 1031
Natural Resources (Dep't of), Duffy v 861
Nautilus Ins Co, Executive Property Development v 1041
Neci v Steel 971
Neely, People v 1050
Nelson, People v (America) 913
Nelson, People v (Deleon) 913
Nelums, People v 1048
Nerenberg, Cohen v 872
Nerenberg, Rosenbaum v 872
Neville v Neville 899
Newble, People v 995
Nicholson, People v 1035
Niewiandomski v Smith 869
Nixon, People v (Kenneth) 852
Nixon, People v (Robin) 1050
Noble, People v 872
Nobles, People v 874

PAGE

Noonan, People v 855
Nordberg, *In re* 864
Nordlund, Watertown Twp v 857
Norman Yatooma & Associates, Reesor v 948
Norton, People v 915
Norwood, People v 997
Novak, People v 1046
Nyland v Lopatin Miller, Freedman, Bluestone, Erlich, Rosen & Bartnick, PC 904

O

ONE's Travel v Department of Treasury 994
Oakhill LP, Inc v Township of Shelby 950
Oakland County Medical Examiner, Waeschle v (*In re* Certified Question From the United States Dist Court for the Eastern Dist of Michigan) 993
Oakland County Prosecutor, King v 858
Oakland County Prosecutor v Parole Bd 996
Oakwood Health Care, Inc, Crandall v 888
Oakwood Healthcare, Inc, Meredith v 1035
Oakwood Heritage Hospital, Cistrunk v 992
O'Berry, *In re* 934
Odusky, People v 995
Office of Financial & Ins Regulation, Michigan Basic Property Ins Ass'n v 1034
Oliver, People v (Ashley) 883
Oliver, People v (Edward) 997
Olsen, People v 913
Ondrus v Citizens Ins Co 887
O'Neal, People v (Sonya) 852
O'Neal, People v (Tyson) 952
Osantowski, Macomb County Prosecutor v 952
Oshtemo Charter Twp v Kalamazoo County Rd Comm 994
Owens, People v 856
Oxholm-Dababneh, Hills & Dales General Hospital v 948

P

PHC of Michigan, Inc, Rubenfaer v 992
PM, *In re* 891

PAGE

Page, People v 1050
Paige v City of Sterling Heights 872
Palace Sports & Entertainment, Inc, Bezeau v 874, 891, 904
Panko, American Home Mortgage Servicing v 1038
Papanek, Boone v 1050
Paquette v State Farm Mutual Automobile Ins Co 910, 1051
Parker, Findling v 1047
Parker, People v (Benny) 947
Parker, People v (Bruce) 863
Parker, People v (Calvin) 870
Parks, People v 955
Parole Bd, Oakland County Prosecutor v 996
Parole Bd, Samuel v 924
Parole of Elias, *In re* 1034
Patreka v Cordle 908
Patterson v CitiFinancial Mortgage Corp 1039
Patty v Ameristar Jet Charter, Inc 988
Pauley, People v 1041
Payne, People v 1027
Payne/Darling/Wright Minors, *In re* 1042
Payton, People v 854
Peck, People v 1050
Peltola, People v 876
Pelton, Simonson v 949
Pena, People v 1045
Penna, People v 870
Pennington, People v 1050
Pennyman, People v 1050
People v Aaron 1046
People v Abbas 1054
People v Abdullah 1042
People v Abron 914
People v Aceval 978
People v Adams (Armel) 872
People v Adams (Barry) 859
People v Adams (Sirdarean) 863
People v Agelink 1049
People v Agurs 913
People v Akram 1037

PAGE

People v Al-Awadi 1047
People v Albers 1041
People v Alberta 1038
People v Aleman 869
People v Alexander (Alex) 857
People v Alexander (DeLeon) 869
People v Allen (Anthony) 1041
People v Allen (Damon) 914
People v Allen (Deborah) 1042
People v Alson 913
People v Amador 870
People v Amparo 1038
People v Anderson (Darick) 1048
People v Anderson (Dmitri) 1049
People v Anderson (Lequin) 1050
People v Anderson (Neki) 871
People v Arnold 1049
People v Atchinson 995
People v Atkins 1045
People v August 995
People v Austin 913
People v Bacon 993
People v Bailey (Antonio) 1045
People v Bailey (Sammie) 953
People v Baker (Donnie) 870
People v Baker (Jeffrey) 916
People v Baker (Samuel) 914
People v Balfour 1047
People v Ball 872
People v Ballard 1049
People v Banks 1038
People v Barkley 901
People v Barnard 911
People v Barnes (Michael) 915
People v Barnes (Timothy) 869
People v Barron 1046
People v Bass 872
People v Bassin 1041
People v Beach 947

PAGE

People v Bean (Amanda) 870
People v Bean (Rafael) 1046
People v Beck 994
People v Beckem 954
People v Beene 995
People v Belcher 871
People v Belin 1047
People v Bell (Anthony) 872
People v Bell (Brandon) 1048
People v Bell (Lester) 870
People v Bell (Tyrone) 947
People v Bennett 913
People v Bernard 980
People v Bernardo 857
People v Bernoudy 914
People v Berry (Anton) 1050
People v Berry (Mervin) 900
People v Binyard 1040
People v Boris 915
People v Bossert 1040
People v Bradley 1039
People v Brady 855
People v Brake 1042
People v Branion 1048
People v Brannon 951
People v Breeding (Andrew) 853, 997
People v Breeding (Terry) 950
People v Briggs (Kevin) 857
People v Briggs (Winston) 948
People v Brigham 1048
People v Brooks (Jeremiah) 854
People v Brooks (Rodreckis) 1049
People v Brooks (Tenora) 1041
People v Browder 995
People v Brown (Fredrick) 913
People v Brown (George) 1040
People v Brown (Rosalind) 872
People v Brown (Symone) 914
People v Brown (Timothy) 857

PAGE

People v Brown (Tony) 1045
People v Brown (William) 1047
People v Broyles 855
People v Bryant 855
People v Buchanan (Kevin) 914
People v Buchanan (Ricky) 1040
People v Buckner 859
People v Burdick 871
People v Burley 1045
People v Burnett 948
People v Busch 873
People v Cadarette 871
People v Cage 996
People v Calhoun 1049
People v Calkins (Gerlad) 869
People v Calkins (Isaiah) 996
People v Calloway 914
People v Caminata 1042
People v Camp 1040
People v Campbell 891
People v Cannon 995
People v Carlson 997
People v Carpenter 884
People v Carreker 868
People v Carrodine 872, 997
People v Carter (Deshawn) 1048
People v Carter (Keith) 949
People v Carter (Leonard) 913
People v Carter (Rodney) 925, 1051
People v Carter (Shelton) 1048
People v Casey 1027
People v Castillo 995
People v Celley 1039
People v Cervi 950
People v Chaney 1050
People v Chapman (Jeffrey) 947
People v Chapman (Keith) 1039
People v Chapman (Robert) 949
People v Chappell 995

PAGE

People v Chase 1039
People v Childs 1049
People v Chu 870, 997
People v Cistrunk 1048
People v Clardy 947
People v Clark (Dennis) 875
People v Clark (Robert) 913
People v Claudio 853
People v Clay 1047
People v Coches 1041
People v Cole 873
People v Coleman 912
People v Collins 1048
People v Color Mini Camera 1041
People v Colwell 870
People v Coney 1046
People v Conklin 1038
People v Conner 996
People v Corr 946
People v Correa 989
People v Corrion 1038, 1041, 1042
People v Corso 948
People v Cousino 854, 995
People v Craig 861
People v Crawford 852
People v Creek 1050
People v Crosby 856
People v Crosthwaite 1040
People v Crowe 910
People v Cruz 994
People v Cunningham 858
People v Daniels 874
People v Darrough 1040
People v Davenport 1054
People v Davidson 854
People v Davis (Andre) 915
People v Davis (Charles) 852
People v Davis (David) 1039
People v Davis (Deontae) 946

PAGE

People v Davis (Matthew) 915
People v Davis (Michael) 1049
People v Davis (Todd) 871
People v Dawson 995
People v Dayson 1050
People v DeJesus 1046
People v Deputy 913
People v Dickens 1046
People v Dienhert 1039
People v Dillard 872
People v Ditta 1040
People v Dixon (Darius) 857
People v Dixon (Hamin) 948
People v Dixon (Joseph) 852
People v Doers 1046
People v Dolly-McGlothlin 872
People v Doss 949
People v Doughrity 872, 997
People v Downs 1045
People v Droste 1041
People v Druzynski 1055
People v Dukes 914
People v Duncan 993
People v Dunlap (Danny) 859
People v Dunlap (Darnell) 1041
People v Dupree 860
People v Edwards 997
People v Elliott 1039
People v Ericksen 1045
People v Ertman 1046
People v Ervin 852
People v Escobar 1046
People v Etherton 911
People v Evans (Lamar) 924
People v Evans (Riley) 948
People v Fairchild 947
People v Farraj 855
People v Farrow 1047
People v Favorite 915

PAGE

People v Finch 948
People v Finley 1049
People v Fitzsimons 853
People v Fleming 914
People v Flowers 870
People v Forbes 1050
People v Foster 1045
People v Fouts 996
People v Fox 1049
People v Frank 913
People v Frederick 996
People v Freeman 995
People v Freemon 871
People v French 1010
People v Friedman 1047
People v Frye (Adonis) 856
People v Frye (Richard) 885
People v Fyda 948
People v Galafati 913
People v Gamble 1049
People v Garcia (Alex) 911
People v Garcia (Carlos) 949
People v Geborkoff 980
People v Gentile (Joseph) 952
People v George (Jarron) 954
People v George (Michael) 877
People v Gibson (Gregory) 1047
People v Gibson (Shad) 980
People v Gilliard 954
People v Gillis 887
People v Gilmore 949
People v Globe 995
People v Glover 1038
People v Gonzales 1045
People v Gonzalez 852
People v Gooding 914
People v Gordon-Nix 994
People v Gorecki 992
People v Goss 1045

PAGE

People v Graham-Jones 996
People v Grandberry 996
People v Gratton 912
People v Graves 1050
People v Green (Reginald) 912
People v Green (Robert) 856
People v Greer 1039
People v Griesemer 1040
People v Griffin 914
People v Grissom 1031
People v Hackworth 915
People v Haeger 1033
People v Hailey 1032
People v Halcomb 994
People v Hall (Ernest) 870
People v Hall (William) 853
People v Hammonds 950
People v Hampton (Aguilar) 855
People v Hampton (Andre) 996
People v Hampton (Kanyama) 1045
People v Hankins (Robert) 915
People v Hankins (Torantie) 873
People v Hardy (David) 951
People v Hardy (James) 916
People v Harrington 859
People v Harris (Freddie) 856
People v Harris (Rhashi) 1046
People v Harris (Rodney) 996, 1052
People v Harris (Scott) 955
People v Harrison 993
People v Hart (Donald) 951
People v Hart (Edward) 952
People v Hartman (Mark) 871, 997
People v Hawkins 1035
People v Haynes 995
People v Hayward 1040
People v Heibel 948
People v Heise 856
People v Henderson (Kenneth) 1050

PAGE

People v Henderson (Paul) 1039
People v Henry 914
People v Hercules-Lopez 995
People v Hernandez 859
People v Herp 995
People v Hicks 1049
People v Hierholzer 1050
People v Hill (Edward) 1049
People v Hill (Kevin) 951
People v Hill (Marcus) 871
People v Hill (Naykima) 862
People v Hinton 900
People v Hobbs 954
People v Hodge 1050
People v Hoggard 996
People v Holcomb 856
People v Hollingsworth 949
People v Holloway 887
People v Holmes (Michael) 854
People v Holmes (Quintin) 855
People v Holmes (Roy) 1041
People v Hopkins 1041
People v Horton 911
People v Howard (Bobby) 995
People v Howard (Connell) 853
People v Hudson (Allen) 913
People v Hudson (David) 871
People v Hudson (Jonathon) 858
People v Hughes 857
People v Hull 912
People v Hunt 995
People v Hurd (Demetrius) 855
People v Hurd (Tony) 1035
People v Hurn 862
People v Huston 876
People v Hutter 981
People v Imelmann 872
People v Isom 854
People v Ivey 1009

PAGE

People v Jackson (Daniel) 954
People v Jackson (Dennis) 857
People v Jackson (Dremaris) 872
People v Jackson (Maurice) 859
People v Jacobs (Jackson) 1040
People v Jacobs (Nathan) 851
People v Jahn 913
People v Jakaj 851
People v Jamison 851
People v Jay 915
People v Jenkins (Germaine) 1039
People v Jenkins (Marquis) 852
People v Jenkins (Nathaniel) 1045
People v Jennings 870
People v Jewell 871
People v Johanson 875
People v Johnson (Brian) 856, 1046
People v Johnson (Charles) 854
People v Johnson (Dale) 1047
People v Johnson (Damien) 872
People v Johnson (David) 1047
People v Johnson (Duane) 870
People v Johnson (Larry) 915
People v Johnson (Mario) 946
People v Johnson (Michael) 860, 1038
People v Johnson (Raymond) 914
People v Johnson (Ronnell) 859
People v Johnson (Terence) 869
People v Jones (Anthony) 852, 1030
People v Jones (Bobbie) 913
People v Jones (Elroy) 855
People v Jones (Garry) 913
People v Jones (James) 915
People v Jones (John) 1031
People v Jones (Joshua) 852
People v Jones (Michael) 1050
People v Jones (Samuel) 1045
People v Jones (Scott) 871
People v Jones (Willie) 915

PAGE

People v Jordan (Ajene) 1046
People v Jordan (Anthony) 854
People v Jordan (Pierre) 857
People v Kamp 1049
People v Keith 914
People v Kennedy 869
People v Keyes 1045
People v Keys 1046
People v Kissner 852
People v Klait 900
People v Knapp 922
People v Knepper 1048
People v Knox 995
People v Koch 854
People v Kolbucaj 873
People v Komolmis 1025
People v Kowalski 953
People v Kurtz 863
People v Kyles 854
People v LaForest 1039
People v LaFrance 949
People v Larkin 949
People v Larkins 1050
People v Laroe 1047
People v LaRose 1047
People v Larry King, *In re* 924
People v Lee (Johnny) 912
People v Lee (Kent) 953
People v Leonard 916
People v Lewis (Charles) 911
People v Lewis (Darquese) 1038
People v Likine 955
People v Lockwood 951
People v Lofton (Darryl) 924
People v Lofton (Timothy) 855
People v Lott 911
People v Love (Jaquan) 1048
People v Love (Larry) 1039
People v Lown 242

PAGE

People v Lucero 1038
People v Lysyuk 910
People v Lyvere 855
People v Mabins 949, 1052
People v Mack 1038
People v Magee 1039
People v Maleckas 1040
People v Malik 1055
People v Malone 947
People v Manzella 854
People v Martin 1038
People v Martinez 1047
People v Mason 1039
People v Mateo-Castellanos 855
People v Maxey 871
People v Mayes (Dominique) 994
People v Mayes (Leslie) 873
People v Mayweather 870
People v Mazak 1048
People v McBurney 858
People v McClinton 949
People v McCloud 1038
People v McConeghy 872
People v McCormick 856
People v McCoy 914
People v McDonald (Scott) 1050
People v McDonald (Terry) 1049
People v McDowell 872
People v McKinney 1054
People v McLemore 995
People v McMillan 911
People v McMullan 922
People v McMurray 949
People v McQuillan 913
People v Meade 869
People v Melbert 913
People v Memminger 1045
People v Merriweather 1038
People v Middlebrook 869

PAGE

People v Miller (Andrew) 1038
People v Miller (Carl) 995
People v Miller (Jeffrey) 872
People v Miller (Marvin) 992
People v Miller (Stanley) 852
People v Mitchell 853
People v Mizori 854
People v Monk 859
People v Moore (Anthony) 914
People v Moore (Christopher) 1046
People v Moore (Gacolby) 946
People v Moore (Mark) 1047
People v Moore (Maurice) 872
People v Moore (Raymond) 1038
People v Moore (Tyrone) 852
People v Moore (Willie) 950
People v Moreno 1010
People v Morgan 922
People v Morrison 1035
People v Mosher 947
People v Moyer 996
People v Mozingo 1045
People v Mullins 910
People v Mungo 920
People v Murray 1038
People v Napier 1046
People v Nash (Freddie) 911
People v Nash (Tenicia) 950
People v Neely 1050
People v Nelson (America) 913
People v Nelson (Deleon) 913
People v Nelums 1048
People v Newble 995
People v Nicholson 1035
People v Nixon (Kenneth) 852
People v Nixon (Robin) 1050
People v Noble 872
People v Nobles 874
People v Noonan 855

PAGE

People v Norton 915
People v Norwood 997
People v Novak 1046
People v Odusky 995
People v Oliver (Ashley) 883
People v Oliver (Edward) 997
People v Olsen 913
People v O'Neal (Sonya) 852
People v O'Neal (Tyson) 952
People v Owens 856
People v Page 1050
People v Parker (Benny) 947
People v Parker (Bruce) 863
People v Parker (Calvin) 870
People v Parks 955
People v Pauley 1041
People v Payne 1027
People v Payton 854
People v Peck 1050
People v Peltola 876
People v Pena 1045
People v Penna 870
People v Pennington 1050
People v Pennyman 1050
People v Peoples (Charlene) 1050
People v Peoples (Nickholas) 915
People v Perkins 949
People v Perreault 859
People v Perry 852
People v Pethers 995
People v Pettiford 872
People v Pettway 1048
People v Phelps 994
People v Phillips (Christian) 859
People v Phillips (Nicholas) 870
People v Phillips (Winfred) 869
People v Phlegm 1039
People v Pierce 874
People v Piggue 1041

PAGE

People v Pilgrim 915
People v Pinder 996
People v Pinnace 872
People v Ponder 853
People v Poole 859
People v Pope 911
People v Posey (Eugene) 1039
People v Posey (Mikel) 1046
People v Poston 857
People v Powell 1039
People v Poynter 996
People v Poyntz 1040
People v Proctor 914
People v Pryor 1038
People v Purify 1047
People v Puttick 949
People v Rader 1040
People v Ragland 1046
People v Raihala 1040
People v Railer 947
People v Ralph 916
People v Ratliff 1040
People v Ray (John) 856
People v Ray (Roger) 887
People v Ream 871
People v Reddell 854
People v Reed (Robert) 852
People v Reed (Roberto) 870
People v Reed (Vonnell) 1039
People v Regains 948
People v Reid (Michael) 917
People v Reid (William) 871
People v Reiss 869
People v Resor 949
People v Reyburn 947
People v Rice 1041
People v Richards 873
People v Richardson (Donald) 1055
People v Richardson (William) 852

PAGE

People v Rickman 996
People v Rinehart 857
People v Roberson 994
People v Robinson (Gerord) 1041
People v Robinson (Joseph) 911
People v Robinson (Vernice) 853
People v Rodriguez (Daniel) 1046
People v Rodriguez (Peter) 1038
People v Rogers (Dante) 1047
People v Rogers (Rowmoto) 1035
People v Rose 1034
People v Rowe (James) 911
People v Rowe (Mark) 856
People v Rucker 1046
People v Rudolph 995
People v Ruffin 891
People v Rupert 914
People v Russell 871
People v Rutkofske 852
People v Sabin (Clifford) 996
People v Sabin (Matthew) 996
People v Sanders 857
People v Sandoval 873
People v Sandoval-Ceron 1027
People v Sanford 994
People v Santure 915
People v Scarber 1046
People v Scarborough 950
People v Schneider 888
People v Schuh 852
People v Schultz 892
People v Scott (Randolph) 1010
People v Scott (Robert) 911
People v Scott (Shaun) 1046
People v Seals 855
People v Seay 913
People v Seegars 872
People v Seiba 1055
People v Sellers 857

PAGE

People v Seymour (Terrance) 856
People v Seymour (William) 856
People v Shannon 1039
People v Shelton 852
People v Sheperd 853
People v Sherrod 1038
People v Short 921
People v Shoup 1049
People v Simpson 1046
People v Sims 900
People v Slaughter 870
People v Smallwood 871
People v Smith 193
People v Smith (Anthony) 1049
People v Smith (Brady) 853
People v Smith (Charles) 1039
People v Smith (Christopher) 1040
People v Smith (Derrick) 1046
People v Smith (Deshawn) 1042
People v Smith (Jack) 1038
People v Smith (Jayce) 1045
People v Smith (Nathaniel) 1038
People v Smith (Tesharra) 914
People v Soares 918
People v Socorro 1041
People v Soule 856
People v Sours 873
People v Sousa 859
People v Spacher 870
People v Span 852
People v Sparks 856
People v Spicer 900
People v Sponseller 1050
People v St Clair (Aaron) 915
People v St Clair (Stanley) 1045
People v Stamper 870
People v Stav 1048
People v Stephens 859
People v Stephenson 871

PAGE

People v Stevens 947
People v Stewart 870
People v Stone 949
People v Strong 948
People v Sumpter 1050
People v Swain 992
People v Swanigan 1045
People v Tackett 1041
People v Taylor (Alan) 910
People v Taylor (David) 1050
People v Taylor (Johnnie) 1040
People v Taylor (Lamont) 1049
People v Taylor (Orange) 912
People v Teall 1035
People v Terry 1025
People v Tetreau 870, 1041
People v Thomas (Absolem) 857
People v Thomas (Rudy) 948
People v Thomas (Steven) 869
People v Thompson (James) 888
People v Thompson (Kristopher) 948
People v Thornton 857
People v Threet 916
People v Tiggle 1049
People v Tigney 912
People v Tilson 949
People v Timarac 1065
People v Tippins 1046
People v Tironi 1038
People v Tobias 949
People v Tolbert (Donald) 872
People v Tolbert (Roderick) 853
People v Tomasik 1053
People v Townsend (Leroy) 1039
People v Townsend (Richard) 852, 951
People v Tramble 996
People v Trevino 858
People v Trice 996
People v Truman 997

PAGE

People v Turman 1048
People v Turner (Chretien) 913
People v Turner (Thomas) 911
People v Twichell 883
People v Tyler (Anthony) 1039
People v Tyler (Warren) 915
People v Urbanawiz 949
People v Valentine 856
People v Vance 996
People v Vandenbosch 1039
People v Vany 855
People v Vartanian 873, 1042
People v Vasquez 947
People v Vermett 947
People v Waclawski 929, 1054
People v Wagner 852
People v Walker 1048
People v Walsh 914
People v Walton (Harry) 854
People v Walton (Jessie) 980
People v Ware 859
People v Warnock 871
People v Washington (Jeff) 1032
People v Washington (Kevin) 947
People v Wasnich 948
People v Watkins 855
People v Watson 911
People v Watts 914
People v Wedell 1046
People v Weill 1050
People v Wengorovius 853
People v Wheeler (Clinton) 856
People v Wheeler (Ronald) 873
People v White (Lee) 855
People v White (Raymond) 1035
People v Whittaker 1038
People v Wilkinson 1038
People v Williams (Anthony) 995
People v Williams (Antonio) 1047

PAGE

People v Williams (Donald) 1045
People v Williams (Dontay) 855
People v Williams (Gary) 870
People v Williams (Jeremy) 997
People v Williams (Joezell) 854
People v Williams (Kenneth) 1038
People v Williams (Ronnie) 948, 1042, 1047
People v Williams (Steven) 1038
People v Williams (Thaddeus) 858, 998
People v Williams (Troy) 887
People v Wills 1041
People v Windmon 1041
People v Winters 947
People v Witherspoon 852, 997
People v Woodley 995
People v Wright (Kelly) 995
People v Wright (Thomas) 994
People v Young 913
People v Younger 1045
People v Zachary 1042
People v Zaker 871
People v Zeigler 1049
People v Zimmerman 871
People v Zuazo 1041
Peoples, People v (Charlene) 1050
Peoples, People v (Nickholas) 915
Perkins, People v 949
Perreault, People v 859
Perrin, Duray Development v 994
Perry, People v 852
Pethers, People v 995
Petrosky-Clark, Daniels v 864
Pettiford, People v 872
Pettway, People v 1048
Phelps, People v 994
Phelps Estate v Allstate Property & Casualty Ins Co 980
Phillips, People v (Christian) 859
Phillips, People v (Nicholas) 870
Phillips, People v (Winfred) 869

PAGE

Phlegm, People v 1039
Pierce, People v 874
Pierson, Green v 876
Piggue, People v 1041
Pilgrim, People v 915
Pinder, People v 996
Pine Bluffs Area Property Owners Ass'n, Inc v DeWitt Landing & Dock Ass'n 947
Pinnace, People v 872
Pittman v Board of Ed, Wyoming Public Schools 862
Plaggemeyer v Lee 907
Plunkett v Department of Transportation 1055
Poisson, Wiedyk v 972
Poly Bond Inc v Jen-Tech Corp 1048
Pomilia, Chase v 911
Ponder, People v 853
Poole, People v 859
Pope, People v 911
Porter, Bethany Lutheran Church v 1049
Posey, People v (Eugene) 1039
Posey, People v (Mikel) 1046
Poston, People v 857
Powell, People v 1039
Poynter, People v 996
Poyntz, People v 1040
Pragasam v Ciena Health Care Management 1051
Pray v Baybest Ribs, LLC 979
Priscilla M Ward Revocable Trust, *In re* 1051
Proctor, People v 914
Progressive Michigan Ins Co, Flowers v 1035
Progressive Michigan Ins Co v Smith 993
Progressive Michigan Ins Co v Sneden 886
Progressive Michigan Ins Co, White v 924
Pryor, People v 1038
Pschigoda v Doolen 1030
Purify, People v 1047
Putruss v Mary A & Edward P O'Halloran Trust 1048
Puttick, People v 949

PAGE

Q

Quality Mfg, Inc v Mann 1045

R

R J Tower Corp, Levaine v 996
Rader, People v 1040
Radulovich, Grievance Administrator v 1039
Ragland, People v 1046
Raihala, People v 1040
Railer, People v 947
Ralph, People v 916
Ramsey v Securitas Security Services 1049
Ratliff, People v 1040
Ray, People v (John) 856
Ray, People v (Roger) 887
Ream, People v 871
Recker v Charter Communications Holding Co 907
Reddell, People v 854
Reed, People v (Robert) 852
Reed, People v (Roberto) 870
Reed, People v (Vonnell) 1039
Reesor v Norman Yatooma & Associates 948
Regains, People v 948
Reid, People v (Michael) 917
Reid, People v (William) 871
Reiss, People v 869
Rentenbach, Alpha Capital Management, Inc v 948
Resor, People v 949
Reyburn, People v 947
Reynolds, Sower v 909
Rheaume v State Farm Automobile Ins Co 858
Rice, Fleming v 924
Rice, People v 1041
Richards, People v 873
Richardson, People v (Donald) 1055
Richardson, People v (William) 852
Richardson v State Employees' Retirement System 913
Richmond Twp v Rondingo, Inc 1051
Richmond Twp v Rondigo LLC 981

PAGE

Rickman, People v 996
Riebschleger, Wilson v 857, 951
Riggs v Anderson 873
Rinehart, People v 857
Rinke Estate, *In re* 1048
Riverwood Subdivision Homeowners Ass'n, Katz v 995
Robelin v Spectrum Health Hospitals 1000
Roberson, People v 994
Robinson, People v (Gerord) 1041
Robinson, People v (Joseph) 911
Robinson, People v (Vernice) 853
Rodriguez, People v (Daniel) 1046
Rodriguez, People v (Peter) 1038
Rogers, People v (Dante) 1047
Rogers, People v (Rowmoto) 1035
Romulus (City of), Crown Enterprises, Inc v 1025
Rondingo, Inc, Richmond Twp v 1051
Rondigo LLC, Richmond Twp v 981
Rose, People v 1034
Rosenbaum v Nerenberg 872
Rowe, People v (James) 911
Rowe, People v (Mark) 856
Roy, Moran v 857
Royal Oak (City of), LaMeau v 1052
Rubenfaer v PHC of Michigan, Inc 992
Rubinstein, Fruitman v 869
Rucker, People v 1046
Rudolph, People v 995
Ruffin, People v 891
Rupert, People v 914
Russell, People v 871
Rutkofske, People v 852
Ruzak v USAA Ins Agency, Inc 944

S

Sabin, People v (Clifford) 996
Sabin, People v (Matthew) 996
Sal-Mar Industrial Corp v Macomb Twp 1049
Sam's Club, Finley v 857

PAGE

Samuel v Parole Bd 924
Sanders, People v 857
Sandoval, People v 873
Sandoval-Ceron, People v 1027
Sanford, People v 994
Santure, People v 915
Savas v Yaker 870
Saveway Food Center, Inc v McNichols Real Estate, LLC . 915
Scarber, People v 1046
Scarborough, People v 950
Schellenberg v Bingham Twp 871, 997
Schmidt v Attorney Grievance Comm 858
Schneider, People v 888
Schooley v Consolidated Roadhouse of Taylor, LLC 981
Schreur v Department of Human Services 1042
Schuh, People v 852
Schultz, People v 892
Scio Twp, Lubienski v 854
Scofield, McCarthy v 1030
Scott, Auto Club Ins Ass'n v 1049
Scott, People v (Randolph) 1010
Scott, People v (Robert) 911
Scott, People v (Shaun) 1046
Scott v Secretary of State 1051
Seals, People v 855
Seay, People v 913
Seck, Alley v 868
Secretary of State, Michigan Ed Ass'n v 18
Secretary of State, Moothart v 1035
Secretary of State, Scott v 1051
Securitas Security Services, Ramsey v 1049
Seegars, People v 872
Seiba, People v 1055
Selim, FIA Card Services, N A v 869
Sellers, People v 857
Seney Spirit Store & Gas Station, Dirla v 888
Senter, Cotrill v 908
Sessions, *In re* 994
Sexton-O'Brien v Nationwide Ins Co 1031

PAGE

Seymour, People v (Terrance) 856
Seymour, People v (William) 856
Shannon, People v 1039
Shaw v City of Ecorse 852
Shelton, People v 852
Sheperd, People v 853
Sherr v West Bloomfield Twp 853
Sherrod, People v 1038
Shinn v Shinn 857
Short, People v 921
Shoup, People v 1049
Simonson v Pelton 949
Simpson, People v 1046
Sims, People v 900
Singer v Sreenivasan 892
Skrine v Vanderbeek 1041
Slaughter, People v 870
Smallwood, People v 871
Smith v Alcona Circuit Judge 916
Smith v Anonymous Joint Enterprise 860
Smith, Niewiandomski v 869
Smith, People v 193
Smith, People v (Anthony) 1049
Smith, People v (Brady) 853
Smith, People v (Charles) 1039
Smith, People v (Christopher) 1040
Smith, People v (Derrick) 1046
Smith, People v (Deshawn) 1042
Smith, People v (Jack) 1038
Smith, People v (Jayce) 1045
Smith, People v (Nathaniel) 1038
Smith, People v (Tesharra) 914
Smith, Progressive Michigan Ins Co v 993
Smith/Tyson Minors, *In re* 1037
Smitter v Thornapple Twp 917
Smyth, *In re* 932
Sneden, Progressive Michigan Ins Co v 886
Soares, People v 918
Socorro, People v 1041

PAGE

Solomon v Blue Water Village East 1053
Sorrell, *In re* 903
Sosnick, McCarthy v 858, 998, 1030
Soule, People v 856
Sours, People v 873
Sousa, People v 859
Sova, Allard v 1040
Sower v Reynolds 909
Spacher, People v 870
Span, People v 852
Sparks, People v 856
Spectrum Health Hospitals, Robelin v 1000
Spicer, People v 900
Spillane v Attorney Grievance Comm 950
Sponseller, People v 1050
Sreenivasan, Singer v 892
St Clair, People v (Aaron) 915
St Clair, People v (Stanley) 1045
St John Health, Washington v 1033
St John Hospital, Linden v 954
Stamper, People v 870
State Employees' Retirement System, Richardson v 913
State Farm Automobile Ins Co, Rheaume v 858
State Farm Mutual Automobile Ins Co, Anderson v 865
State Farm Mutual Automobile Ins Co, Paquette v ... 910, 1051
State Farm Mutual Automobile Ins Co, Wilcox v 930, 1011
State Farm Mutual Ins Co, Graves v 984
State of Michigan, Duncan v 957, 1011, 1019
State of Michigan, King v 208
State Treasurer v Fender 1039
Stav, People v 1048
Steel, Neci v 971
Stephens, People v 859
Stephenson, People v 871
Sterling Heights (City of), Paige v 872
Stevens, People v 947
Stewart, People v 870
Stillson Estate, *In re* 993
Stockson, Jilek v 1053

PAGE

Stoiko, Decker v 947
Stone, People v 949
Stout Tool Corp v Kane 869
Strong, People v 948
Stuart Frankel Development Corp, Inc, Colaianni v 1019
Studley v Hill Twp 988
Summit Polymers, Inc v Atek Thermoforming, Inc 854
Sumpter, People v 1050
Sunde v Sunde 917
Suttles Truck Leasing, Inc, Word v 997
Swain, People v 992
Swanigan, People v 1045
Swanson v Westgate Living Center 873, 997
Swanson, Yursco v 973
Swartz Creek Community Schools, Clark v 993

T

TBI Enterprises, LLC, Blue River Financial Group, Inc v 1047
Tabbert v Barkway 873
Tackett, People v 1041
Taylor, People v (Alan) 910
Taylor, People v (David) 1050
Taylor, People v (Johnnie) 1040
Taylor, People v (Lamont) 1049
Taylor, People v (Orange) 912
Teall, People v 1035
Terry, People v 1025
Tetreau, People v 870, 1041
Therrien, Elliott v 869
36th Dist Court v AFSCME Local 3308 994
Thomas, Computer Business World, LLC v 1047
Thomas, People v (Absolem) 857
Thomas, People v (Rudy) 948
Thomas, People v (Steven) 869
Thompson, People v (James) 888
Thompson, People v (Kristopher) 948
Thornapple Twp, Smitter v 917
Thorne v Great Atlantic & Pacific Tea Co, Inc 884
Thornton, People v 857

PAGE

Threet, People v 916
Tiernan v Dietrich 954
Tiggle, People v 1049
Tigney, People v 912
Tilson, People v 949
Timarac, People v 1065
Tindall v Attorney Grievance Comm 1036
Tippins, People v 1046
Tironi, People v 1038
Titan Ins Co, May v 862
Titan Ins Co, University of Michigan Regents v 893
Tobias, People v 949
Toca, Grievance Administrator v 995
Tolbert, People v (Donald) 872
Tolbert, People v (Roderick) 853
Toler, McManus v 1027
Tomasik, People v 1053
Townsend, People v (Leroy) 1039
Townsend, People v (Richard) 852, 951
Township of Shelby, Oakhill LP, Inc v 950
Tramble, People v 996
Trans-Porte, Inc, Baker v 924
Transportation (Dep't of), Blue Harvest, Inc v 900
Transportation (Dep't of), McCue v 954
Transportation (Dep't of), Plunkett v 1055
Treasury (Dep't of), ASAMA Coldwater Mfg, Inc v 873
Treasury (Dep't of), Burt v 1047
Treasury (Dep't of), Ford Motor Co v 1026
Treasury (Dep't of), Midwest Bus Corp v 992
Treasury (Dep't of), ONE's Travel v 994
Trevino, People v 858
Trice, People v 996
Troy (City of), Kocenda v 857
Truman, People v 997
Trupiano v Trupiano 870
Tucker v Capital Area Transportation Auth 950
Tuma, Velez v 903
Turkette v Turkette 856
Turman, People v 1048

PAGE

Turner, People v (Chretien) 913
Turner, People v (Thomas) 911
Tus v Hurt 980
Tuscola Circuit Court, Bodrie v 948
Twichell, People v 883
2000 Baum Family Trust v Babel 136
Tyler, People v (Anthony) 1039
Tyler, People v (Warren) 915
Tyrone Bell, People v 947
Tyson v Attorney Grievance Comm 1052

U

USAA Ins Agency, Inc, Ruzak v 944
Ulrich, Burnett v 954, 1052
Underwood Property Management Co, Catro v 949
United American Acquisitions & Management, Inc, Burke v 1035
University of Michigan Regents v Titan Ins Co 893
University of Michigan Regents, Yohn v 915
Upjohn Estate, *In re* 862
Urbanawiz, People v 949
Utica Community Schools, Adair v 1037

V

Valentine, People v 856
Vales, *In re* 929
Vance, People v 996
Vandenbosch, People v 1039
Vanderbeek, Skrine v 1041
Vanderbeke, Benson v 910
VanFossen, Kloian v 911
Vanopdenbosch Construction Co, Ajax Paving Industries v . 1045
Vany, People v 855
Vartanian, People v 873, 1042
Vasquez, People v 947
Velez v Tuma 903
Vemulapalli v City of Flint 873
Vermett, People v 947

PAGE

Victor Automotive Products, Inc, White v 875
Village of Milford, Milford Housing, LLC v 854
Voelker v Home Office Realty 996

W

W A Foote Memorial Hospital, Ykimoff v 988
Waclawski, People v 929, 1054
Waeschle v Oakland County Medical Examiner (*In re* Certified Question From the United States Dist Court for the Eastern Dist of Michigan) 993
Wagner, People v 852
Walker, People v 1048
Walsh, People v 914
Walton, People v (Harry) 854
Walton, People v (Jessie) 980
Ward-Tenbroeke v Mackenzie's Animal Sanctuary, Inc 910
Ware, People v 859
Warner v Center for Forensic Psychiatry 862
Warnock, People v 871
Warren v Coca-Cola Enterprises Inc 1049
Washington, People v (Jeff) 1032
Washington, People v (Kevin) 947
Washington v St John Health 1033
Washtenaw County v AFSCME Council 25 1046
Waslawski, Kircos v 947, 1051
Wasnich, People v 948
Watertown Twp v Nordlund 857
Watkins, People v 855
Watson, People v 911
Watts, People v 914
Wausau Ins Co, Johnson v 907
Wayne County, AFSCME Council 25 v 1008
Wayne County, Butler v 1055
Wayne County, Michigan AFSCME Council 25 v 864
Wedell, People v 1046
Weichuhn v Catholic Diocese of Lansing 852
Weill, People v 1050
Wells Fargo Bank, NA v Cooper 1039
Wengorovius, People v 853

PAGE

West Bloomfield Twp, Sherr v 853
West Michigan Lakeshore Ass'n of Realtors, Livingston v ... 913
Westgate Living Center, Swanson v 873, 997
Wexford County, Dextrom v 853
Wheeler, People v (Clinton) 856
Wheeler, People v (Ronald) 873
White, People v (Lee) 855
White, People v (Raymond) 1035
White v Progressive Michigan Ins Co 924
White v Victor Automotive Products, Inc 875
Whitehorn v Department of Corrections 854
Whittaker, People v 1038
Wiedyk v Poisson 972
Wilcox v State Farm Mutual Automobile Ins Co 930, 1011
Wilhelmi v Bradford 851
Wilkinson, People v 1038
William Beaumont Hospital, Fanning v 869
Williams v City of Detroit 889
Williams, People v (Anthony) 995
Williams, People v (Antonio) 1047
Williams, People v (Donald) 1045
Williams, People v (Dontay) 855
Williams, People v (Gary) 870
Williams, People v (Jeremy) 997
Williams, People v (Joezell) 854
Williams, People v (Kenneth) 1038
Williams, People v (Ronnie) 948, 1042, 1047
Williams, People v (Steven) 1038
Williams, People v (Thaddeus) 858, 998
Williams, People v (Troy) 887
Williams v Z F Lemforder Corp 1050
Wills, People v 1041
Wilson v Riebschleger 857, 951
Windmon, People v 1041
Winters, People v 947
Wirth v Amsted Industries, Inc 877
Witherspoon, People v 852, 997
Wolf v City of Detroit 875
Wolfgang v Dixie Cut Stone & Marble, Inc 887

PAGE

Woodhaven-Brownstown School Dist, Michigan AFSCME Council 25 v 974
Woodley, People v 995
Word v Suttles Truck Leasing, Inc 997
World Savings Bank v Nassar 874
Wright, People v (Kelly) 995
Wright, People v (Thomas) 994

Y

Yaker, Savas v 870
Ykimoff v W A Foote Memorial Hospital 988
Yohn v University of Michigan Regents 915
Young, Farmers Ins Exch v 980
Young, People v 913
Younger, People v 1045
Yursco v Swanson 973

Z

Z F Lemforder Corp, Williams v 1050
Zachary, People v 1042
Zadrzynski v Golf Services, LLC 1065
Zaker, People v 871
Zavodsky v Zavodsky 893
Zeigler, People v 1049
Zimmerman, People v 871
Zlatkin, LaSalle Bank Midwest v 913, 1051
Zuazo, People v 1041
Zunich v Midmichigan Medical Center 863

TABLE OF SPECIAL ORDERS NOT RELATED TO SPECIFIC CASES

PAGE

PROPOSED AMENDMENTS OF MICHIGAN COURT RULES

MCR 2.002 1201
MCR 2.112 1413
MCR 2.117 1403
MCR 2.203 1404
MCR 2.403 1406
MCR 2.411 1407
MCR 2.507 1408
MCR 3.216 1407
MCR 3.707 1422
MCR 3.501 ....1416, 1417
MCR 5.208 1421
MCR 6.005 1418
MCR 6.425 1409
MCR 7.123 1415
MCR 7.206 1413
MCR 7.210 1409
MCR 7.213 1414
MCR 8.110 1258
MCR 8.120 1258
MCR 8.121 1202
MCR 8.126 1203
MCR 9.101 1206
MCR 9.103 1206
MCR 9.104 1207
MCR 9.105 1211
MCR 9.106 1211
MCR 9.107 1212
MCR 9.108 1212
MCR 9.109 1213
MCR 9.110 1214
MCR 9.111 1215

PAGE

MCR 9.112 1216
MCR 9.113 1221
MCR 9.114 1222
MCR 9.115 1226
MCR 9.116 1232
MCR 9.118 1234
MCR 9.119 1235
MCR 9.120 1238
MCR 9.121 1240
MCR 9.122 1246
MCR 9.123 1247
MCR 9.124 1249
MCR 9.125 1251
MCR 9.126 1252
MCR 9.127 1254
MCR 9.128 1254
MCR 9.129 1256
MCR 9.130 1256
MCR 9.131 1256

PROPOSED ADOPTION OF MICHIGAN COURT RULES
MCR 2.412 1405

PROPOSED AMENDMENTS OF RULES FOR THE BOARD OF LAW EXAMINERS
Rule 8 1420

PROPOSED AMENDMENTS OF MICHIGAN CODE OF JUDICIAL CONDUCT
Canon 4 1411
Canon 5 1411

PROPOSED AMENDMENTS OF RULES CONCERNING THE STATE BAR OF MICHIGAN
Rule 3 1419

TABLE OF ADMINISTRATIVE ORDERS AND RULES ADOPTED

Administrative Orders

No. 2010-6 lxxxvii
No. 2011-1 xcix

Rules Adopted

Michigan Court Rules of 1985

MCR 1.108 cxi
MCR 2.002 cxxiv
MCR 3.705 cxxv
MCR 3.973 cxii
MCR 3.975 cxii
MCR 3.976 cxiii
MCR 6.201 cxiv
MCR 6.425 cxxiv
MCR 6.610 cxxiii
MCR 7.212 cxxvii
MCR 7.215 cxxvii
MCR 8.110 cxxvii
MCR 8.120 cxvi

Michigan Rules of Professional Conduct

Rule 2.4 cxxix
Rule 3.1 cxxxi
Rule 3.3 cxxxiii
Rule 3.4 cxlii
Rule 3.5 cxliv
Rule 3.6 cxlv
Rule 5.5 cli
Rule 5.7 clviii
Rule 6.6 clxiii
Rule 8.5 clxv

ADMINISTRATIVE ORDER No. 2010-6

E-FILING PILOT PROJECT IN THE 16TH CIRCUIT COURT (MACOMB COUNTY)

Entered December 28, 2010 (File No. 2002-37)—REPORTER.

On order of the Court, the 16th Circuit Court is authorized to implement an Electronic Document Filing Pilot Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin on January 1, 2011, or as soon thereafter as is possible, and shall remain in effect until December 31, 2012, or further order of this Court. The 16th Circuit Court is aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of the 16th Circuit Court Electronic Document Filing Pilot Project, the 16th Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules. The 16th Circuit Court will track the participation and effectiveness of this pilot program and shall report to and provide information as requested by the State Court Administrative Office.

1. Construction

The purpose of the pilot program is to study the effectiveness of electronically filing court documents in

connection with the just, speedy, and economical determination of the actions involved in the pilot program. The Sixteenth Circuit Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing documents during the pilot program, the Michigan Rules of Court govern all other aspects of the cases involved in the pilot.

2. Definitions

a. "Clerk" means the Macomb County Clerk.

b. "E-filing" means any court pleading, motion, brief, response, list, order, judgment, notice, or other document filed electronically pursuant to the pilot program.

c. "LAO" means all local administrative orders governing the Sixteenth Judicial Circuit Court.

d. "MCR" means the Michigan Rules of Court.

e. "Pilot program" means the initiative by the Sixteenth Judicial Circuit Court, the Macomb County Clerk/Register of Deeds, and the Macomb County Information Technology Department in conjunction with Vista Solutions Group, LP, and under the supervision of the State Court Administrative Office. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents. All state courts in Michigan are envisioned as eventually permitting e-filing (with appropriate modifications and improvements). The Macomb County pilot program will begin testing with two circuit judges with "C" and "N" type civil cases. The court plans to expand the pilot program to all circuit judges. The pilot program is expected to last approximately two years, beginning on January 1, 2011, and will be implemented in phases as described below.

f. "Technical malfunction" means any hardware, software, or other malfunction that prevents a user from timely filing a complete e-filing or sending or receiving service of an e-filing.

3. Participation in the Pilot Program

a. Participation in the pilot program shall be mandatory in all pending "C" or "N" case types assigned to participating circuit judges. Participation shall be assigned following the filing and service of the initial complaint or other initial filing and assignment of the case to a participating judge. At the discretion of the judge, participation may also include post-disposition proceedings in qualifying case types assigned to participating judges. The pilot will be implemented in phases as follows:

i. Phase 1: The Macomb County pilot program will begin with Civil/Criminal Division civil cases wherein the case suffix begins with a "C" or an "N" with two judges.

ii. Phase 2: Three additional Civil/Criminal Division judges will be added to the pilot within six months after the pilot has begun.

iii. Phase 3: The remaining Civil/Criminal Division judges will be added within three months after Phase 2 has begun.

iv. Phase 4: The remaining civil cases will be added to the pilot within three months after Phase 3 has begun upon approval by the Michigan Supreme Court.

b. This is a mandatory e-filing project. It is presumed that all documents will be filed electronically. However, the Court recognizes that circumstances may arise that will prevent a party from e-filing. To ensure that all parties retain access to the courts, parties that demonstrate good cause will be permitted to file their docu-

ments with the Clerk, who will then file the documents electronically. Among the factors that the Sixteenth Circuit Court will consider in determining whether good cause exists to excuse a party from mandatory e-filing are a party's access to the Internet and indigency. A self-represented party is not excused from the project merely because the individual does not have counsel.

4. E-filings Submission, Acceptance, and Time of Service with the Court; Signature

a. In an effort to facilitate uniform service within the scope of this project, the Sixteenth Circuit Court strongly recommends electronic service.

b. Program participants must submit e-filings pursuant to these rules and the pilot program's technical requirements. The Clerk may, in accordance with MCR 8.119(C), reject documents submitted for filing that do not comply with MCR 2.113(C)(1), are not accompanied by the proper fees, clearly violate Administrative Order No. 2006-2, do not conform to the technical requirements of this pilot project, or are otherwise submitted in violation of a statute, an MCR, an LAO, or the program rules.

c. E-filings may be submitted to the Court around the clock (with the exception of periodic maintenance). E-filings submitted after the close of normal business hours (which is currently 4:30 p.m.) shall be deemed filed on the next business day. Although the system may be used on a 24-hour basis, technical support will generally only be available during regular business hours.

d. E-filings shall be treated as if they were hand-delivered to the court for all purposes under statute, the MCR, and the LAO.

e. A pleading, document, or instrument e-filed or electronically served under this rule shall be deemed to have been signed by the judge, court clerk, attorney, party, or declarant.

i. Signatures submitted electronically shall use the following form: /s/ *John L. Smith*.

ii. A document that requires a signature under the penalty of perjury is deemed signed by the declarant if, before filing, the declarant has signed a printed form of the document.

iii. An e-filed document that requires a signature of a notary public is deemed signed by the notary public if, before filing, the notary public has signed a printed form of the document.

f. The original of a sworn or verified document that is an e-filing (e.g., a verified pleading) or part of an e-filing (e.g., an affidavit, notarization, or bill of costs) must be maintained by the filing attorney and made available upon reasonable request of the court, the signatory, or opposing party.

g. Proposed orders shall be submitted to the court in accordance with the provisions of the pilot program. The court and the clerk shall exchange the documents for review and signature pursuant to MCR 2.602(B).

h. By electronically filing the document, the electronic filer indicates compliance with these rules.

5. Time for Service and Filing of Pleadings, Documents, and Motions; Judge's Copies; Hearings on Motions; Fees

a. All times for filing and serving e-filings shall be governed by the applicable statute, the MCR and the LAO as if the e-filings were hand-delivered.

b. Where a praecipe is required, it must be e-filed along with the documents that require the praecipe, unless another court-approved mechanism is approved and used by the filer.

c. The electronic submission of a motion and brief through this pilot program satisfies the requirements of filing a judge's copy under MCR 2.119(A)(2). Upon request by the Court, the filing party shall promptly provide a traditional judge's copy to chambers.

d. Applicable fees, including e-filing fees and service fees, shall be paid electronically through procedures established by the Macomb County Clerk's Office at the same time and in the same amount as required by statute, court rule, or administrative order.

i. Each e-filing is subject to the following e-filing fees:

(1) EFO (e-filing only) $5.00

(2) EFS (e-filing with service) $8.00

(3) SO (service only) $5.00

ii. Users who use credit cards for payment may also be responsible for a user fee not to exceed 3 percent.

6. Service

a. All parties shall provide the court and opposing parties with one e-mail address with the functionality required for the pilot program. All service shall originate from and be perfected upon this e-mail address.

b. Unless otherwise agreed to by the court and the parties, all e-filings must be served electronically to the e-mail addresses of all parties. The subject matter line for the transmittal of document served by e-mail shall state: "Service of e-filing in case [insert caption of case]."

c. The parties and the court may agree that, instead of e-mail service, e-filings may be served to the parties

(but not the court) by facsimile or by traditional means. For those choosing to accept facsimile service:

i. the parties shall provide the court and the opposing parties with one facsimile number with appropriate functionality,

ii. the facsimile number shall serve as the number to which service may be made,

iii. the sender of the facsimile should obtain a confirmation of delivery, and

iv. parties shall comply with the requirements of MCR 2.406 on the use of facsimile communication equipment.

d. Proof of Service shall be submitted to the 16th Circuit Court according to MCR 2.107(D) and these rules.

7. Format and Form of E-filing and Service

a. A party may only e-file documents for one case in each transaction.

b. All e-filings shall comply with MCR 1.109 and the technical requirements of the court's vendor.

c. Any exhibit or attachment that is part of an e-filing must be clearly designated and identified as an exhibit or attachment.

d. All e-filings, subject to subsection 6(c) above, shall be served on the parties in the same format and form as submitted to the court.

8. Pleadings, Motions, and Documents not to be E-filed

The following documents shall not be e-filed during the pilot program and must be filed by the traditional methods provided in the MCR and the LAO:

a. initiating documents, and

b. documents to be filed under seal (pursuant to court order).

9. Official Court Record; Certified Copies

a. For purposes of this pilot program, e-filings are the official court record. An appellate record shall be certified in accordance with MCR 7.210(A)(1).

b. Certified or true copies of e-filed documents shall be issued in the conventional manner by the Macomb County Clerk's Office in compliance with the Michigan Trial Court Case File Management Standards.

c. At the conclusion of the pilot program, if the program does not continue as a pilot project or in some other format, the clerk shall convert all e-filings to paper form in accordance with MCR 8.119(D)(1)(d). Participating attorneys shall provide reasonable assistance in constructing the paper record.

d. At the conclusion of the pilot program, if the program continues as a pilot project or in another format, the Clerk shall provide for record retention and public access in a manner consistent with the instructions of the court and the court rules.

10. Court Notices, Orders, and Judgments

At the court's discretion, the court may issue, file, and serve orders, judgments, and notices as e-filings. Pursuant to a stipulation and order, the parties may agree to accept service from the court via facsimile pursuant to the procedures set forth in Rule 6(c).

11. Technical Malfunctions

a. A party experiencing a technical malfunction with the party's equipment (such as Portable Document Format [PDF] conversion problems or inability to access the pilot sites), another party's equipment (such as an inoperable e-mail address), or an apparent technical malfunction of the court's pilot equipment, software, or

server shall use reasonable efforts to timely file or receive service by traditional methods and shall provide prompt notice to the court and the parties of any such malfunction.

b. If a technical malfunction has prevented a party from timely filing, responding to, or otherwise perfecting or receiving service of an e-filing, the affected party may petition the 16th Circuit Court for relief. Such petition shall contain an adequate proof of the technical malfunction and set forth good cause for failure to use non-electronic means to timely file or serve a document. The court shall liberally consider proof of the technical malfunction and use its discretion in determining whether such relief is warranted.

12. Privacy Considerations (Personal Identifiers)

a. With respect to any e-filing, the following requirements for personal information shall apply for the following personal identifiers:

i. Social Security Numbers: Pursuant to Administrative Order No. 2006-2, full social security numbers shall not be included in e-filings. If an individual's social security number must be referenced in an e-filing, only the last four digits of that number may be used and the number specified in the following format: XXX-XX-1234.

ii. Names of Minor Children: Unless named as a party, the identity of minor children shall not be included in e-filings. If a non-party minor child must be mentioned, only the initials of that child's name may be used.

iii. Dates of Birth: An individual's full birth date shall not be included in e-filings. If an individual's date of birth must be referenced in an e-filing, only the year may be used and the date specified in the following format: XX/XX/1998.

iv. Financial Account Numbers: Full financial account numbers shall not be included in e-filings unless required by statute, court rule, or other authority. If a financial account number must be referenced in an e-filing, only the last four digits of these numbers may be used and the number specified in substantially the following format: XXXXX1234.

v. Driver's License Numbers and State-Issued Personal Identification Card Numbers: A person's full driver's license number and state issued personal identification number shall not be included in e-filings. If an individual's driver's license number or state-issued personal identification card number must be referenced in an e-filing, only the last four digits of that number should be used and the number specified in substantially the following format: X-XXXXXX-XX1-234.

vi. Home Addresses: With the exception of a self-represented party, full home addresses shall not be included in e-filings. If an individual's home address must be referenced in an e-filing, only the city and state should be used.

b. Parties wishing to file a pleading containing a complete personal data identifier as listed above may:

i. Pursuant to and in accordance with the MCR and the LAO, file a motion to file a traditional paper version of the document under seal. The court, in granting the motion to file the document under seal, may still require that an e-filing that does not reveal the complete personal data identifier be filed for the public files; or,

ii. Pursuant to and in accordance with the applicable MCR and LAO, obtain a court order to file a traditional paper reference list under seal. The reference list shall contain the complete personal data identifiers and the redacted identifiers used in the e-filing. All references

in the case to the redacted identifiers included in the reference list shall be construed to refer to the corresponding complete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

c. Parties should exercise caution when filing papers that contain private or confidential information, including, but not limited to, the information covered above and listed below:

i. Medical records, treatment and diagnosis;

ii. Employment history;

iii. Individual financial information;

iv. Insurance information;

v. Proprietary or trade secret information

vi. Information regarding an individual's cooperation with the government; and,

vii. Personal information regarding the victim of any criminal activity.

13. Records and Reports: Further, the 16th Circuit Court shall file an annual report with the Supreme Court covering the project to date by January 1 of each year (or more frequently or on another date as specified by the Court) that outlines the following:

a. Detailed financial data that show the total amount of money collected in fees for documents filed or served under the pilot project to date, the original projections for collections of fees, and whether the projections have been met or exceeded.

b. Detailed financial information regarding the distribution or retention of collected fees, including the amount paid to each vendor per document and in total for the subject period, the amount retained by the Court

per document and in total for the period, and whether the monies retained by the Court are in a separate account or

c. commingled with other monies.

d. A detailed itemization of all costs attributed to the project to date and a statement of whether and when each cost will recur.

e. A detailed itemization of all cost savings to the Court whether by reduced personnel or otherwise and a statement of whether any cost savings to the Court are reflected in the fee structure charged to the parties.

f. Information regarding how the filing and service fees were calculated and whether it is anticipated that those fees will be necessary and continued after the conclusion of the pilot program.

g. A statement of projections regarding anticipated e-filing and service-fee collections and expenditures for the upcoming periods.

14. Amendment

These rules may be amended upon the recommendation of the participating judges, the approval of the Chief Judge, and authorization by the State Court Administrator.

15. Expiration

Unless otherwise directed by the Michigan Supreme Court, this pilot program, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until December 31, 2012.

ADMINISTRATIVE ORDER No. 2011-1

E-FILING PILOT PROJECT IN THE 3RD CIRCUIT COURT (WAYNE COUNTY)

Entered February 1, 2011 (File No. 2002-37)—REPORTER.

On order of the Court, the 3rd Circuit Court is authorized to implement an Electronic Document Filing Pilot Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin January 1, 2011, or as soon thereafter as is possible, and shall remain in effect until July 1, 2015, or further order of this Court. The 3rd Circuit Court is aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of the 3rd Circuit Court Electronic Document Filing Pilot Project, the 3rd Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules.

The 3rd Circuit Court will track the participation and effectiveness of this pilot program and shall report to and provide information as requested by the State Court Administrative Office.

1. Construction

The purpose of the pilot program is to study the effectiveness of electronically filing court documents in

connection with the just, speedy, and economical determination of the actions involved in the pilot program. The 3rd Circuit Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing or service of documents during the pilot program, the Michigan Rules of Court govern all other aspects of the cases involved in the pilot.

2. Definitions

(a) "Clerk" means the Wayne County Clerk.

(b) "E-filing" means any court pleading, motion, brief, response, list, order, judgment, notice, or other document filed electronically pursuant to the pilot program.

(c) "LAO" means all local administrative orders governing the 3rd Circuit Court.

(d) "MCR" means the Michigan Court Rules.

(e) "Pilot program" means the initiative by the 3rd Circuit Court, and the Wayne County Clerk in conjunction with Tyler Technologies, Inc., and under the supervision of the State Court Administrative Office to facilitate the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents. The pilot program will begin testing with asbestos cases. The 3rd Circuit Court and the Wayne County Clerk plan to expand the testing into the remainder of case types in the civil division upon approval by the Supreme Court.

(f) "Asbestos" means the matters that the pilot project will test and are described as all pending cases identified as an "NP" case type based in whole or in part on a claim of injury as a result of exposure to asbestos.

(g) "Technical malfunction" means any hardware, software, or other malfunction that prevents a user from timely filing a complete e-filing or sending or receiving service of an e-filing.

3. Participation in the Pilot Program

(a) Participation in the pilot project shall be mandatory in all pending "Asbestos" type cases. Participation shall be assigned following the filing and service of the initial complaint or other initial filing and assignment of the case to the participating judge. Expansion into the other civil division case types will occur after approval by the Supreme Court.

(b) This is a mandatory e-filing project. It is presumed that all documents will be filed electronically. However, the Court recognizes that circumstances may arise that will prevent one from e-filing. To ensure that all parties retain access to the courts, parties that demonstrate good cause will be permitted to file their documents with the clerk, who will then file the documents electronically. Among the factors that the 3rd Circuit Court will consider in determining whether good cause exists to excuse a party from mandatory e-filing is a party's access to the Internet and indigency. A self-represented party is not excused from the project merely because the individual does not have counsel.

4. E-filings Submission, Acceptance and Time of Service with the Court; Signature

(a) Program participants must submit e-filings pursuant to these rules and the pilot project's technical requirements. The clerk may, in accordance with MCR 8.119(C), reject documents submitted for filing that do not comply with MCR 2.113(C)(1), are not accompanied by the proper fees, do not conform to the technical

requirements of this pilot project, or are otherwise submitted in violation of a statute, an MCR, an LAO, or the program rules.

(b) E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing by the clerk's office during the normal business hours of 8:30 a.m. to 4:30 p.m. E-filings submitted after business hours shall be deemed filed on the business day the e-filing is accepted (usually the next business day). The clerk shall process e-filings on a first-in, first-out basis.

(c) E-filings shall be treated as if they were hand-delivered to the court for all purposes under statute, the MCR, and the LAO.

(d) A pleading, document, or instrument e-filed or electronically served under this rule shall be deemed to have been signed by the judge, court clerk, attorney, party, or declarant.

(i) Signatures submitted electronically shall use the following form: /s/ John L. Smith.

(ii) A document that requires a signature under penalty of perjury is deemed signed by the declarant if, before filing, the declarant has signed a printed form of the document.

(iii) An e-filed document that requires a signature of a notary public is deemed signed by the notary public if, before filing, the notary public has signed a printed form of the document.

(e) The original of a sworn or verified document that is an e-filing (e.g., a verified pleading) or part of an e-filing (e.g., an affidavit, notarization, or bill of costs) must be maintained by the filing attorney and made available upon reasonable request of the court, the signatory, or opposing party.

(f) Proposed orders shall be submitted to the court in accordance with the provisions of the pilot project. The court and the clerk shall exchange the documents for review and signature pursuant to MCR 2.602(B).

(g) By electronically filing the document, the electronic filer affirms compliance with these rules.

5. Time for Service and Filing of Pleadings, Documents, and Motions; Judge's Copies, Hearings on Motions; Fees

(a) All times for filing and serving e-filings shall be governed by the applicable statute, the MCR, and the LAO as if the e-filings were hand-delivered.

(b) The electronic submission of a motion and brief through this pilot project satisfies the requirements of filing a judge's copy under MCR 2.119(A)(2). Upon request by the court, the filing party shall promptly provide a traditional judge's copy to chambers.

(c) Applicable fees, including e-filing fees and service fees, shall be paid electronically through procedures established by the clerk at the same time and in the same amount as required by statute, court rule, or administrative order.

(i) Each e-filing is subject to the following e-filing fees:

Type of Filing	Fee
EFO (e-filing only)	$5.00
EFS (e-filing with service)	$8.00
SO (service only)	$5.00

(ii) Users who use credit cards for payment are also responsible for a 3% user fee.

6. Service

(a) All parties shall provide the court and opposing parties with one e-mail address with the functionality

required for the pilot project. All service shall originate from and be perfected upon this e-mail address.

(b) Unless otherwise agreed to by the court and the parties, all e-filings must be served electronically to the e-mail addresses of all parties. The subject matter line for the transmittal of document served by e-mail shall state: "Service of e-filing in case [insert caption of case]."

(c) The parties and the court may agree that, instead of e-mail service, e-filings may be served to the parties (but not the court) by facsimile or by traditional means. For those choosing to accept facsimile service:

(i) the parties shall provide the court and the opposing parties with one facsimile number with appropriate functionality,

(ii) the facsimile number shall serve as the number to which service may be made,

(iii) the sender of the facsimile should obtain a confirmation of delivery, and

(iv) parties shall comply with the requirements of MCR 2.406 on the use of facsimile communication equipment.

(d) Proof of service shall be submitted to the 3rd Circuit Court according to MCR 2.107(D) and this administrative order.

7. Format and Form of E-filing and Service

(a) A party may only e-file documents for one case in each transaction.

(b) All e-filings shall comply with MCR 1.109 and the technical requirements of the court's vendor.

(c) Any exhibit or attachment that is part of an e-filing must be clearly designated and identified as an exhibit or attachment.

(d) All e-filings, subject to section 6(c) above, shall be served on the parties in the same format and form as submitted to the court.

(e) All documents filed electronically shall be in electronically generated text format (such as native portable digital format [PDF]) so that the text of the submission is searchable and taggable. Any attachments and exhibits that are not available as electronically generated text may be scanned.

(f) When a filing includes grouped documents (i.e., a motion and accompanying exhibits or attachments) each such document shall be separately bookmarked by an identifying tab.

8. Pleadings, Motions, and Documents not to be E-filed

The following documents shall not be e-filed during the pilot project and must be filed by the traditional methods provided in the MCR and the LAO:

(a) documents to be filed under seal (pursuant to court order),

(b) initiating documents, and

(c) documents for case evaluation proceedings.

9. Official Court Record; Certified Copies

(a) For purposes of this pilot project, e-filings are the official court record. An appellate record shall be certified in accordance with MCR 7.210(A)(1).

(b) Certified or true copies of e-filed documents shall be issued in the conventional manner by the clerk in compliance with the Michigan Trial Court Case File Management Standards.

(c) At the conclusion of the pilot project, if the program does not continue as a pilot project or in some other format, the clerk shall convert all e-filings to

paper form in accordance with MCR 8.119(D)(1)(d). Participating attorneys shall provide reasonable assistance in constructing the paper record.

(d) At the conclusion of the pilot project, if the program continues as a pilot project or in another format, the clerk shall provide for record retention and public access in a manner consistent with the instructions of the Court and the court rules.

10. Court Notices, Orders, and Judgments

At the court's discretion, the court may issue, file, and serve orders, judgments, and notices as e-filings. Pursuant to a stipulation and order, the parties may agree to accept service from the court via facsimile pursuant to the procedures set forth in section 6(c) above.

11. Technical Malfunctions

(a) A party experiencing a technical malfunction with the party's equipment (such as format or conversion problems or inability to access the pilot sites), another party's equipment (such as an inoperable e-mail address), or an apparent technical malfunction of the court's pilot equipment, software, or server shall use reasonable efforts to timely file or receive service by traditional methods and shall provide prompt notice to the court and the parties of any such malfunction.

(b) If a technical malfunction has prevented a party from timely filing, responding to, or otherwise perfecting or receiving service of an e-filing, the affected party may petition the 3rd Circuit Court for relief. Such petition shall contain an adequate proof of the technical malfunction and set forth good cause for failure to use non-electronic means to timely file or serve a document. The court shall liberally consider proof of the technical

malfunction and use its discretion in determining whether such relief is warranted.

12. Privacy Considerations

(a) With respect to any e-filing, the following requirements for personal information shall apply:

(i) Social Security Numbers. Pursuant to Administrative Order No. 2006-2, full social security numbers shall not be included in e-filings. If an individual's social security number must be referenced in an e-filing, only the last four digits of that number may be used and the number specified in substantially the following format: XXX-XX-1234.

(ii) Names of Minor Children. Unless named as a party, the identity of a minor child shall not be included in e-filings. If a nonparty minor child must be mentioned, only the initials of that child's name may be used.

(iii) Dates of Birth. An individual's full birth date shall not be included in e-filings. If an individual's date of birth must be referenced in an e-filing, only the year may be used and the date specified in substantially the following format: XX/XX/1998.

(iv) Financial Account Numbers. Full financial account numbers shall not be included in e-filings unless required by statute, court rule, or other authority. If a financial account number must be referenced in an e-filing, only the last four digits of these numbers may be used and the number specified in substantially the following format: XXXXX1234.

(v) Driver's License Numbers and State-Issued Personal Identification Card Numbers. A person's full driver's license number and state-issued personal identification number shall not be included in e-filings. If an individual's driver's license number or state-issued

personal identification card number must be referenced in an e-filing, only the last four digits of that number should be used and the number specified in substantially the following format: X-XXX-XXX-XX1-234.

(vi) Home Addresses. With the exception of a self-represented party, full home addresses shall not be included in e-filings. If an individual's home address must be referenced in an e-filing, only the city and state shall be used.

(b) Parties wishing to file a complete personal data identifier listed above may:

(i) Pursuant to and in accordance with the MCR and/or the LAO, file a motion to file a traditional paper version of the document under seal. The court, in granting the motion to file the document under seal, may still require that an e-filing that does not reveal the complete personal data identifier be filed for the public files, or

(ii) Pursuant to and in accordance with the applicable MCR and LAO, obtain a court order to file a traditional paper reference list under seal. The reference list shall contain the complete personal data identifiers and the redacted identifiers used in the e-filing. All references in the case to the redacted identifiers included in the reference list shall be construed to refer to the corresponding complete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

(c) Parties should exercise caution when filing papers that contain private or confidential information, including, but not limited to, the information covered above and listed below:

(i) Medical records, treatment and diagnosis;

(ii) Employment history;

(iii) Individual financial information;

(iv) Insurance information;

(v) Proprietary or trade secret information;

(vi) Information regarding an individual's cooperation with the government; and

(vii) Personal information regarding the victim of any criminal activity.

13. Records and Reports

The 3rd Circuit Court shall file an annual report with the Supreme Court covering the project to date by January 1 of each year (or more frequently or on another date as specified by the Court) that outlines the following:

(a) Detailed financial data that show the total amount of money collected in fees for documents filed or served under the pilot project to date, the original projections for collections of fees, and whether the projections have been met or exceeded.

(b) Detailed financial information regarding the distribution or retention of collected fees, including the amount paid to Tyler Technologies, Inc., per document and in total for the subject period, the amount retained by the court per document and in total for the period, and whether the monies retained by the court are in a separate account or commingled with other monies.

(c) A detailed itemization of all costs attributed to the project to date and a statement of whether and when each cost will recur.

(d) A detailed itemization of all cost savings to the court whether by reduced personnel or otherwise and a statement of whether any cost savings to the court are reflected in the fee structure charged to the parties.

(e) Information regarding how the filing and service fees were calculated and whether it is anticipated that those fees will be necessary and continued after the conclusion of the pilot program.

(f) A statement of projections regarding anticipated e-filing and service-fee collections and expenditures for the upcoming periods.

14. Amendment

Procedural aspects of these rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the State Court Administrator. Proposed substantive changes, including, for example, a proposed expansion of the program to permit additional case types and a proposed change in fees, must be submitted to the Supreme Court for approval.

15. Expiration

Unless otherwise directed by the Michigan Supreme Court, this pilot project, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until July 15, 2015.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted September 21, 2010, effective immediately (File No. 2009-30)—REPORTER.

[The present language is repealed and replaced by the following language, with additions indicated by underline and deletions by strikeover, unless otherwise indicated below:]

RULE 1.108. COMPUTATION OF TIME.

In computing a period of time prescribed or allowed by these rules, by court order, or by statute, the following rules apply:

(1) The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or ~~holiday~~ day on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or ~~holiday~~ day on which the court is closed pursuant to court order.

(2)-(3) [Unchanged.]

Staff comment: The amendment of MCR 1.108(1) extends the rule to any day that the court has ordered a court closure. A time period would be extended to the next day the court is open.

The staff comment is not an authoritative construction by the Court.

Adopted September 21, 2010, effective January 1, 2011 (File No. 2010-09)—REPORTER.

[The present language is repealed and replaced by the following language, with additions indicated by underline and deletions by strikeover, unless otherwise indicated below:]

RULE 3.973. DISPOSITIONAL HEARING.

(A)-(D) [Unchanged.]

(E) Evidence; Reports.

(1)-(4) [Unchanged.]

(5) The court, upon receipt of a local foster care review board's report, shall include the report in the court's confidential social file. The court shall ensure that all parties have had the opportunity to review the report and file objections before a dispositional order, dispositional review order, or permanency planning order is entered. The court may at its discretion include recommendations from the report in its orders.

(F)-(H) [Unchanged.]

RULE 3.975. POST-DISPOSITIONAL PROCEDURES: CHILD IN FOSTER CARE.

(A)-(D) [Unchanged.]

(E) Procedure. Dispositional review hearings must be conducted in accordance with the procedures and rules of evidence applicable to the initial dispositional hearing. The report of the agency that is filed with the court must be accessible to the parties and offered into evidence. The court shall consider any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom a child is placed, in addition to any other relevant and material evidence at the hearing. The court, on request of a party or on its

own motion, may accelerate the hearing to consider any element of a case service plan. The court, upon receipt of a local foster care review board's report, shall include the report in the court's confidential social file. The court shall ensure that all parties have had the opportunity to review the report and file objections before a dispositional order, dispositional review order, or permanency planning order is entered. The court may at its discretion include recommendations from the report in its orders.

(F)-(H) [Unchanged.]

RULE 3.976. PERMANENCY PLANNING HEARINGS.

(A)-(C) [Unchanged.]

(D) Hearing Procedure; Evidence.

(1)-(2) [Unchanged.]

(3) The court, upon receipt of a local foster care review board's report, shall include the report in the court's confidential social file. The court shall ensure that all parties have had the opportunity to review the report and file objections before a dispositional order, dispositional review order, or permanency planning order is entered. The court may at its discretion include recommendations from the report in its orders.

(E) [Unchanged.]

Staff Comment: The amendments of MCR 3.973, 3.975, and 3.976 require a court to maintain a local foster care review board report in the court's confidential social file, and ensure that all parties have had the opportunity to review the report before the court enters a dispositional order, dispositional review order, or permanency planning order. Courts also may include recommendations from the report in their orders under the new language.

The staff comment is not an authoritative construction by the Court.

Adopted September 21, 2010, effective January 1, 2011 (File No. 2008-38)—REPORTER.

[The present language is repealed and replaced by the following language, with additions indicated by underline and deletions by strikeover, unless otherwise indicated below:]

RULE 6.201. DISCOVERY.

(A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:

(1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial;

(2) any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement;

(3) the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion;

(4) any criminal record that the party may use at trial to impeach a witness;

(5) a description or list of criminal convictions, known to the defense attorney or prosecuting attorney, of any witness whom the party may call at trial; and

(6) a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any document, photograph, or other paper, with copies to be provided on request. A party

may request a hearing regarding any question of costs of reproduction, including the cost of providing copies of electronically recorded statements. On good cause shown, the court may order that a party be given the opportunity to test without destruction any tangible physical evidence.

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

(1) any exculpatory information or evidence known to the prosecuting attorney;

(2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;

(3) any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;

(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

(C)-(J) [Unchanged.]

(K) Except as otherwise provided in MCR 2.302(B)(6), electronic materials are to be treated in the same manner as nonelectronic materials under this rule. Nothing in this rule shall be construed to conflict with MCL 600.2163a.

Staff Comment: This amendment specifically incorporates electronically recorded statements into the materials that must be provided to other parties in a criminal proceeding, although the judge may specify the conditions for discovery as allowed under MCR 2.302(B)(6).

The staff comment is not an authoritative construction by the Court.

Adopted November 16, 2010, effective January 1, 2011 (File No. 2009.25)—REPORTER.

[The present language is amended below with additions indicated in underlining and deletions indicated in strikeover.]

RULE 8.120. LAW STUDENTS AND RECENT GRADUATES; PARTICIPATION IN LEGAL AID CLINICS, DEFENDER OFFICES, AND LEGAL TRAINING PROGRAMS.

(A) Legal Aid Clinics; Defender Offices. Effective legal service for each person in Michigan, regardless of that person's ability to pay, is important to the directly affected person, to our court system, and to the whole citizenry. Law students and recent law graduates, under supervision by a member of the state bar, may staff public and nonprofit defender offices~~,~~ and legal aid clinics that are organized under a city or county bar association or an accredited law school or for the primary purpose of providing free legal services to indigent persons.

(B) Legal Training Programs. Law students and recent law graduates may participate in legal training programs organized in the offices of county prosecuting attorneys, county corporation counsel, city attorneys, and the Attorney General.

(C) Eligible Students. A student in a law school approved by the American Bar Association who has received a passing grade in law school courses and has completed the first year is eligible to participate in a clinic or program listed in subrules (A) and (B) if the student meets the academic and moral standards established by the dean of that school. For the purpose of this rule, a "recent law graduate" is a person who has graduated from law school within the last year. The student or graduate must certify in writing that he or

she has read and is familiar with the Michigan Rules of Professional Conduct and the Michigan Court Rules, and shall take an oath which is reasonably equivalent to the Michigan Lawyer's Oath in requiring at a minimum the promise to: (a) support the Constitution of the United States; (b) support the Constitution of the State of Michigan; (c) maintain the respect due to courts of justice and judicial officers; (d) never seek to mislead a judge or jury by any artifice or false statement of fact or law; (e) maintain the confidence and preserve inviolate the secrets of the client; (f) abstain from all offensive personality; (g) advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause; and (h) in all other respects conduct himself or herself personally and professionally in conformity with the high standards of conduct imposed upon members of the state bar of Michigan.

(D) Scope; Procedure.

(1) A member of the legal aid clinic, in representing an indigent person, is authorized to advise the person and to negotiate and appear on the person's behalf in all Michigan courts except the ~~Court of Appeals and the~~ Supreme Court. The indigent person that will be assisted by the student must consent in writing to the representation.

(2) Representation must be conducted under the supervision of a state bar member. Supervision by a state bar member includes the duty to examine and sign all pleadings filed. It does not require the state bar member to be present

(a) while a law student or graduate is advising an indigent person or negotiating on the person's behalf, or

(b) during a courtroom appearance of a law student or graduate, except

(i) during an appellate argument or

(ii) in a criminal or juvenile case exposing the client to a penalty of imprisonment~~more than 6 months~~.

The supervising attorney shall assume all personal professional responsibility for the student's or graduate's work, and should consider purchasing professional liability insurance to cover the practice of such student or graduate.

(3) A law student or graduate may not appear in a case in a Michigan court without the approval of the judge ~~of that court~~ or a majority of the panel of judges to which the case is assigned. If the judge or a majority of the panel grants approval, the judge or a majority of the panel may suspend the proceedings at any stage if the judge or a majority of the panel ~~he or she~~ determines that the representation by the law student or graduate

(a) is professionally inadequate, and

(b) substantial justice requires suspension.

In the Court of Appeals, a request for a law student or graduate to appear at oral argument must be submitted by motion to the panel that will hear the case. The panel may deny the request or establish restrictions or other parameters for the representation on a case-by-case basis.

(4) A law student or graduate serving in a prosecutor's, county corporation counsel's, city attorney's, or Attorney General's program may be authorized to perform comparable functions and duties assigned by the prosecuting attorney, county attorney, city attorney, or Attorney General, except that

(a) the law student or graduate is subject to the conditions and restrictions of this rule; and

(b) the law student or graduate may not be appointed as an assistant prosecutor, assistant corporation counsel, assistant city attorney, or assistant Attorney General.

Staff Comment: Under this amendment, a law student or recent law graduate who is a member of a legal aid clinic is eligible to appear on behalf of a client in the Court of Appeals. The appearance would require the same protections that now exist, i.e., supervision by a licensed attorney who signs all pleadings, and approval by a majority of the judges of the assigned panel. In addition, the amendments require that an indigent person indicate in writing that he or she consents to the representation by the student, and the student must certify that he or she is familiar with the Michigan Rules of Professional Conduct and the Michigan Court Rules. The amendments further state that the supervising attorney shall assume personal professional liability for the student's or graduate's work, and require students and recent graduates to take an oath similar to the one taken by licensed attorneys. The Court will review the effects of this rule in two years.

The staff comment is not an authoritative construction by the Court.

MARKMAN, J. (*dissenting*). The modified court rule would allow law students to represent persons in the Court of Appeals of this state. I offered three amendments to the modified rule, requiring (a) that such students must take an oath which is reasonably equivalent to the Michigan Lawyer's Oath; (b) that the student's supervising attorney assume personal professional responsibility for the student's representation; and (c) that the supervising attorney must be present during all appellate arguments in a criminal or juvenile case exposing the client to a penalty of imprisonment.

I am pleased that my colleagues have adopted these amendments and, in truth, my concerns about the modified rule are now considerably allayed, in particular by the fact that student advocates, who are *most* in need of appreciating their specific obligations to the Constitution, to the court, to clients, to opposing counsel, to parties and witnesses, and to rules of professional conduct, will not be

the only practitioners in the Court of Appeals who are *exempt* from taking an oath to honor these obligations.

Nonetheless, I must still cast my vote against the modified rule. By our supervision of the Michigan State Bar, the Attorney Grievance Commission, the Attorney Discipline Board, and the Board of Law Examiners, a significant responsibility of this Court is to enhance the quality of legal practice in this state. I respectfully believe that extending authority to law students to argue before the second-highest court of our state does not fulfill this responsibility.

My opposition is not intended in any way to disparage the students who will engage in this new practice, the attorneys who will supervise these students, or the law schools that will train these students. Each is to be respected and commended for their efforts. However, in the final analysis, I cannot ignore that such students have not yet completed their legal education, they have not yet been judged competent to practice law by the examination and "character and fitness" procedures of this state, and they have not garnered the experience, perspective and judgment that comes with the sustained practice of the law. With few exceptions, these are all attributes and qualities that characterize those who engage in advocacy in our Court of Appeals.

While I have little doubt that those students who have demonstrated the energy and initiative to participate in clinical and training programs, and who have been selected by their schools to argue before the Court of Appeals, will come to be among the best of our appellate practitioners, I do not believe it is in the best interests of their clients, or of our legal system, that this occur prematurely. I respectfully dissent.

Adopted December 29, 2010, effective January 1, 2011 (File No. 2008-39)—REPORTER.

[The present language is amended below with additions indicated in underlining and deletions indicated in strikeover.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A) Presentence Report; Contents.

(1) Prior to sentencing, the probation officer must investigate the defendant's background and character, verify material information, and report in writing the results of the investigation to the court. The report must be succinct and, depending on the circumstances, include:

(1)-(12) [Relettered (a)-(l), but otherwise unchanged.]

(2) A presentence investigation report shall not include any address or telephone number for the home, workplace, school, or place of worship of any victim or witness, or a family member of any victim or witness, unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual. Upon request, any other address or telephone number that would reveal the location of a victim or witness or a family member of a victim or witness shall be exempted from disclosure unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual.

(3) Regardless of the sentence imposed, the court must have a copy of the presentence report and of any psychiatric report sent to the Department of Correc-

tions. If the defendant is sentenced to prison, the copies must be sent with the commitment papers.

(B) Presentence Report; Disclosure Before Sentencing. The court must provide copies of the presentence report to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days, before the day of sentencing. The prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain a copy of the report or an amended report. If the presentence report is not made available to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment of the day of sentencing to enable the moving party to review the presentence report and to prepare any necessary corrections, additions, or deletions to present to the court. ~~The presentence report shall not include the following information about any victim or witness: home address, home telephone number, work address, or work telephone number, unless an address is used to identify the place of the crime.~~ The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report.

The court's decision to exempt part of the report from disclosure is subject to appellate review.

(C)-(G) [Unchanged.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(E) [Unchanged.]

(F) Sentencing.

(1) For sentencing, the court shall:

(a) require the presence of the defendant's attorney, unless the defendant does not have one or has waived the attorney's presence;

(b) provide copies of the presentence report (if a presentence report was prepared) to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days before the day of sentencing. The prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain a copy of the report or an amended report. If the presentence report is not made available to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment to enable the moving party to review the presentence report and to prepare any necessary corrections, additions or deletions to present to the court, or otherwise advise the court of circumstances the prosecutor or defendant believes should be considered in imposing sentence. ~~The presentence report shall not include the following information about any victim or witness: home address, home telephone number, work address, work telephone number, or any other information prohibited from disclosure pursuant to MCL 780.751 *et*~~

~~*seq.*, unless an address is used to identify the place of the crime.~~ A presentence investigation report shall not include any address or telephone number for the home, workplace, school, or place of worship of any victim or witness, or a family member of any victim or witness, unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual. Upon request, any other address or telephone number that would reveal the location of a victim or witness or a family member of a victim or witness shall be exempted from disclosure unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual.

(c) inform the defendant of credit to be given for time served, if any.

(2)-(3) [Unchanged.]

(G)-(H) [Unchanged.]

Staff comment: This order codifies statutory changes enacted as 2010 PA 247 and 2010 PA 248.

The staff comment is not an authoritative construction by the Court.

Entered February 1, 2011 (File No. 2008-12)—REPORTER.

On order of the Court, the proposed amendment of Rule 2.002 of the Michigan Court Rules having been published for comment at 488 Mich 1201-1202 (2010), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

Adopted February 1, 2011, effective immediately (File No. 2010-36)—REPORTER.

On order of the Court, the need for immediate action having been found, the notice requirements of MCR 1.201 are dispensed with and the following amendment of Rule 3.705 of the Michigan Court Rules is adopted, effective immediately. Comments will be received until June 1, 2011, and may be submitted to the Supreme Court Clerk in writing or electronically to P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-36. Your comments and comments of others will be posted on the Supreme Court's website at the following: www.courts.mi.gov/supremecourt/resources/administrative/index.htm. The amendment will be considered at a future public hearing. The notices and schedules of public hearings are posted on the Supreme Court's website at the following address: www.courts.mi.gov/suprememcourt/resources/administrative/ph.htm.

[The present language is repealed and replaced by the following language, with additions indicated in underlining and deletions indicated in strikeover, unless otherwise indicated below.]

RULE 3.705. ISSUANCE OF PERSONAL PROTECTION ORDERS.

(A) [Unchanged.]

(B) Hearings.

(1) The court shall schedule a hearing as soon as possible in the following instances, unless it determines after interviewing the petitioner that the claims are sufficiently without merit that the action should be dismissed without a hearing:

(a) the petition does not request an ex parte order; or

(b) the court refuses to enter an ex parte order and the petitioner subsequently requests a hearing.

(2) The petitioner shall serve on the respondent notice of the hearing along with the petition as provided in MCR 2.105(A). If the respondent is a minor, and the whereabouts of the respondent's parent or parents, guardian, or custodian is known, the petitioner shall also in the same manner serve notice of the hearing and the petition on the respondent's parent or parents, guardian, or custodian. One day before the hearing on a petition seeking a PPO under MCL 600.2950 or MCL 600.2950a(1) is deemed sufficient notice. Two days before the hearing on a petition seeking a PPO under MCL 600.2950a(2) is deemed sufficient notice.

(3) The hearing shall be held on the record.

(4) The petitioner must attend the hearing. If the petitioner fails to attend the hearing, the court may adjourn and reschedule the hearing or dismiss the petition.

(5) If the respondent fails to appear at a hearing on the petition and the court determines the petitioner made diligent attempts to serve the respondent, whether the respondent was served or not, the order may be entered without further notice to the respondent if the court determines that the petitioner is entitled to relief.

(6) At the conclusion of the hearing the court must state the reasons for granting or denying a personal protection order on the record and enter an appropriate order. In addition, the court must state the reasons for denying a personal protection order in writing, and, in a proceeding under MCL 600.2950a, the court must state in writing the specific reasons for issuance of the order.

Staff Comment: This amendment, submitted to the Court by the State Bar of Michigan Domestic Violence Committee, amends MCR 3.705 to allow sufficient time for a respondent to file a written motion and offer of proof at least 24 hours before a hearing as required by statute. MCL

600.2950a(4) requires that a respondent who wants to introduce evidence covered by the rape-shield provision of MCL 750.520j submit a notice and offer of proof at least 24 hours before the hearing. Before adoption of this amendment, the rule's one-day notice of hearing requirement would not have provided the respondent 24 hours within which to submit the offer of proof, so the SBM Domestic Violence Committee recommended that the rule be amended to change the time provision regarding notice of hearing for a sexual assault PPO to two days instead of one day.

The staff comment is not an authoritative construction by the Court.

Entered February 1, 2011 (File No. 2009-22)—REPORTER.

On order of the Court, the proposed amendments of Rules 7.212 and 7.215 of the Michigan Court Rules having been published for comment at 486 Mich 1220-1222 (2010), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendments. This administrative file is closed without further action.

Adopted February 1, 2011, effective May 1, 2011 (File No. 2010-21)—REPORTER.

[The present language is repealed and replaced by the following language, with additions indicated in underlining and deletions indicated in strikeover, unless otherwise indicated below.]

RULE 8.110. CHIEF JUDGE RULE.

(A)-(B) [Unchanged.]

(C) Duties and Powers of Chief Judge.

(1)-(4) [Unchanged.]

(5) The chief judge of the court in which criminal proceedings are pending shall have filed with the state court administrator a quarterly report listing the following cases in a format prescribed by the state court administrator:

(a)-(b) [Unchanged.]

(c) in computing the 126-day and 301-day periods, the court shall exclude periods of delay

(1)-(3) [Unchanged.]

(4) during the time an order is in effect that stays the disposition or proceedings of the case pending interlocutory appellate review.

(6)-(7) [Unchanged.]

(D) [Unchanged.]

Staff Comment: The amendment of MCR 8.110(C)(5)(c)(4) excludes cases that are stayed during an interlocutory appeal from being included in the group of cases delayed beyond the time guidelines that are required to be reported by the chief judge to the State Court Administrator.

The staff comment is not an authoritative construction by the Court.

AMENDMENT OF MICHIGAN RULES OF PROFESSIONAL CONDUCT

Adopted October 26, 2010, effective January 1, 2011 (File No. 2009-06)—REPORTER.

[The present language is repealed and replaced by the following language, with additions indicated by underline and deletions by strikeover, unless otherwise indicated below. New Rules 2.4, 5.7, and 6.6 contain no underlining or strikeover.]

RULE 2.4. LAWYER SERVING AS THIRD-PARTY NEUTRAL.

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral must inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer must explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, an arbitrator, a conciliator, or an evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, an evaluator, or a decision maker depends on the particular process that is selected by the parties or mandated by a court.

The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals also may be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association, or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution.

Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing

them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

Lawyers who represent clients in alternative dispute resolution are governed by the Michigan Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration, the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Staff Comment: There is no equivalent to MRPC 2.4 in the current Michigan Rules of Professional Conduct. The rule is designed to help parties involved in alternative dispute resolution to better understand the role of a lawyer serving as a third-party neutral.

RULE 3.1. MERITORIOUS CLAIMS AND CONTENTIONS.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. A lawyer may

offer a good-faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may so defend the proceeding as to require that every element of the case be established.

Comment

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also has a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good-faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the ~~client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person. Likewise, the action is frivolous if the~~ lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification, or reversal of existing law.

Staff Comment: The amendments of MRPC 3.1 make no changes in the current rule, but modify the accompanying commentary to clarify that a lawyer is not responsible for a client's subjective motivation.

RULE 3.3. CANDOR TOWARD THE TRIBUNAL.

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

~~(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;~~

(~~3~~2) fail to disclose to a tribunal controlling legal authority ~~in the jurisdiction~~ known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(~~4~~3) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(b) If a lawyer knows that the lawyer's client or other person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to an adjudicative proceeding involving the client, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(~~b~~c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

~~(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.~~

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts that are known to the lawyer ~~and~~ that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) When false evidence is offered, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures. The advocate should seek to withdraw if that will remedy the situation. If withdrawal from the representation is not permitted or will not remedy the effect of the false evidence, the lawyer must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6.

Comment

This rule governs the conduct of a lawyer who is representing a client in a tribunal. It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, subrule (a) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

As officers of the court, lawyers have special duties to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. ~~The advocate's task is to present the client's case with persuasive force.~~

Performance of that duty while maintaining confidences of the client is qualified, however, by the advocate's duty of candor to the tribunal. ~~However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.~~ Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer. An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, because litigation documents ordinarily present assertions by the client or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), see the comment to that rule. See also the comment to Rule 8.4(b).

~~Misleading~~ Legal Argument. Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities.

Furthermore, as stated in paragraph (a)(3<u>2</u>), an advocate has a duty to disclose directly controlling adverse authority ~~in the jurisdiction which~~ <u>that</u> has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

~~*False Evidence. When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.*~~

~~*When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.*~~

~~*Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.*~~

Offering Evidence. Paragraph (a)(3) requires that a lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.

If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness' testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false. A lawyer's knowledge that evidence is false can be inferred from the circumstances. Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

~~*Perjury by a Criminal Defendant. Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.*~~

~~*The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.*~~

~~*Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence, but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution, but makes the advocate a knowing instrument of perjury.*~~

~~*The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify, and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(c).*~~

Remedial Measures. ~~*If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially.*~~ *Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know*

that the evidence is false. Or a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. If that fails, the lawyer ~~advocate should seek to withdraw if that will remedy the situation~~ must take further remedial action. ~~If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court.~~ It is for the ~~court~~ tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. ~~If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, the second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

The disclosure of a client's false testimony can result in grave consequences to the client, including a sense of betrayal, the loss of the case, or perhaps a prosecution for perjury. However, the alternative is that the lawyer aids in the deception of the court, thereby subverting the truth-finding process that the adversarial system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer must remediate the disclosure of false evidence, the client

could simply reject the lawyer's counsel to reveal the false evidence and require that the lawyer remain silent. Thus, the client could insist that the lawyer assist in perpetrating a fraud on the court.

~~*Constitutional Requirements. The general rule–that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client–applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. The obligation of the advocate under these rules is subordinate to such a constitutional requirement.*~~

Preserving Integrity of Adjudicative Process. Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating, or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence, or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure, if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding. See Rule 3.4.

Duration of Obligation. A practical time limit on the obligation to rectify the presentation of false evidence or false statements of law and fact must be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

~~*Refusing to Offer Proof Believed to Be False. Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may be denied this authority by constitutional requirements governing the right to counsel.*~~

Ex Parte Proceedings. Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts that are known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal. Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a

lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this rule or as otherwise permitted by Rule 1.6.

Staff Comment: The changes in MRPC 3.3 specify in paragraph (a)(1) that a lawyer shall not knowingly "fail to correct a false statement of material fact or law," and substitute paragraph (b) for current paragraph (a)(2), which deals with a disclosure that is "necessary to avoid assisting a criminal or fraudulent act by the client." In addition, several paragraphs from the comment relating to remedial actions a lawyer must take upon learning that false testimony has been offered have been combined and inserted into the body of the rule as new subsection (e).

RULE 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party;

(e) during trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when

testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party, unless:

(1) the person is ~~a relative or~~ an employee or other agent of a client for the purposes of MRE 801(d)(2)(D); and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improper influence of witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Other law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. It is, however, improper to pay an occurrence witness any fee for testifying beyond that authorized by law, and it is improper to pay an expert witness a contingent fee.

~~*Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, because the employees may identify their interests with those of the client. See also Rules 4.2 and 4.3*~~.

Staff Comment: The amendments of MRPC 3.4 clarify in paragraph (f)(1) that a lawyer may not ask someone other than a client to refrain from voluntarily giving relevant information to another party unless the person is "an employee or other agent of a client for the purposes of MRE 801(d)(2)(D)."

RULE 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(b) communicate ex parte with such a person concerning a pending matter, ~~except as permitted by law; or~~ unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication constitutes misrepresentation, coercion, duress or harassment; or

~~(c)~~(d) engage in undignified or discourteous conduct toward the tribunal.

Comment

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Michigan Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters, or jurors, unless authorized to do so by law or court order.

A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so, unless the communication is prohibited by law or a court order, but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from undignified or discourteous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge, but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Staff Comment: The amendments of MRPC 3.5 add paragraph (c), which clarifies the rule regarding lawyers' contact of jurors and prospective jurors after the jury is discharged.

RULE 3.6. TRIAL PUBLICITY.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make

an extrajudicial statement that ~~a reasonable person would expect to~~ the lawyer knows or reasonably should know will be disseminated by means of public communication ~~if the lawyer knows or reasonably should know that it~~ and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. A statement is likely to have a substantial likelihood of materially prejudicing an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation, or criminal record of a party, of a suspect in a criminal investigation or of a witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, ~~or~~ the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement

explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(b) Notwithstanding paragraph (a), a lawyer who is participating or has participated in the investigation or litigation of a matter may state without elaboration:

(1) the nature of the claim, offense, or defense involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, also:

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessar-

ily entails some curtailment of the information that may be disseminated about a party ~~prior to~~ before trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

~~No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. Moreover, the confidentiality provisions of Rule 1.6 may prevent the disclosure of information which might otherwise be included in an extrajudicial statement. In addition, s~~Special rules of confidentiality may validly govern ~~proceedings in~~ juvenile, domestic relations, and mental disability proceedings, ~~and perhaps~~ in addition to other types of litigation. Rule 3.4(c) requires compliance with such rules.

~~For guidance in this difficult area, one may consider the following language adapted from the American Bar Association's Model Rule 3.6:~~

Rule 3.6 sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by

the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates.

~~*(a) A statement referred to in Rule 3.6 ordinarily is likely to have such a prejudicial effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:*~~

~~*(1) the character, credibility, reputation or criminal record of a party, of a suspect in a criminal investigation or of a witness, or the identity of a witness, or the expected testimony of a party or witness;*~~

~~*(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;*~~

~~*(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;*~~

~~*(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;*~~

~~*(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or*~~

~~*(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.*~~

~~*(b) Notwithstanding Rule 3.6 and paragraphs (a)(1-5) of this portion of the comment, a lawyer involved in the investigation or litigation of a matter may state without elaboration:*~~

~~*(1) the general nature of the claim or defense;*~~

~~*(2) the information contained in a public record;*~~

~~*(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;*~~

~~*(4) the scheduling or result of any step in litigation;*~~

~~*(5) a request for assistance in obtaining evidence and information necessary thereto;*~~

~~*(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and*~~

~~*(7) in a criminal case:*~~

~~*(A) the identity, residence, occupation and family status of the accused;*~~

~~*(B) if the accused has not been apprehended, information necessary to aid in apprehension of that person;*~~

~~*(C) the fact, time and place of arrest; and*~~

~~*(D) the identity of investigating and arresting officers or agencies and the length of the investigation.*~~

See Rule 3.8(e) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Staff Comment: The amendments in this rule expand the current rule considerably by moving substantial portions of the current commentary into the rule itself. See, for example, paragraph (b), and the latter portion of paragraph (a). The initial part of paragraph (a) is substantially the same as the current rule, except that the "reasonable lawyer" standard is substituted for the "reasonable person" standard.

RULE 5.5. UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW.

(a) A lawyer shall not: ~~(a)~~ practice law in a jurisdiction ~~where doing so violates~~ in violation of the regulation of the legal profession in that jurisdiction~~;~~, or assist another in doing so.

(b) ~~assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.~~ A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by law or these rules, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide temporary legal services in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer or a person the lawyer is assisting is authorized by law to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in

which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not covered by paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by law to provide in this jurisdiction.

Comment

A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by law, order, or court rule to practice for a limited purpose or on a restricted basis. See, for example, MCR 8.126, which permits, under certain circumstances, the temporary admission to the bar of a person who is licensed to practice law in another jurisdiction, and Rule 5(E) of the Rules for the Board of Law Examiners, which permits a lawyer who is admitted to practice in a foreign country to practice in Michigan as a special legal consultant, without examination, provided certain conditions are met.

Paragraph (a) applies to the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. The definition of the practice of law is established by law and

varies from one jurisdiction to another. Whatever the definition, ~~L~~limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule ~~Paragraph (b)~~ does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for it ~~their work~~. See Rule 5.3.

~~Likewise it does not prohibit~~ A lawyers ~~from providing~~ may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law, for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

There are occasions on which a lawyer admitted to practice in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of clients, the public,

or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not indicate whether the conduct is authorized. With the exception of paragraphs (d)(1) and (d)(2), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted here to practice generally.

There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction and, therefore, may be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any jurisdiction of the United States, including the District of Columbia and any state, territory, or commonwealth. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice and is in good standing to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who, while technically admitted, is not authorized to practice because, for example, the lawyer is on inactive status or is suspended for nonpayment of dues.

Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal

or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice, such as MCR 8.126, or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a law or court rule of this jurisdiction requires that a lawyer who is not admitted to practice in this jurisdiction obtain admission pro hac vice before appearing before a tribunal or administrative agency, this rule requires the lawyer to obtain that authority.

Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice under MCR 8.126. Examples of such conduct include meetings with a client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage temporarily in this jurisdiction in conduct related to pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction, provided that those services are in or are reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction and the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice under MCR 8.126 in the case of a court-annexed arbitration or mediation, or otherwise if required by court rule or law.

Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction if they arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not covered by paragraphs (c)(2) or (c)(3). These services include both legal services and services performed by nonlawyers that would be considered the practice of law if performed by lawyers.

Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors indicate such a relationship. The lawyer's client previously may have been represented by the lawyer or may reside in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work may be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship may arise when the client's activities or the legal issues involve multiple jurisdic-

tions, such as when the officers of a multinational corporation survey potential business sites and seek the services of the corporation's lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise, as developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.

Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another jurisdiction of the United States and is not disbarred or suspended from practice in any jurisdiction may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as to provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. This paragraph applies to in-house corporate lawyers, government lawyers, and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by statute, court rule, executive regulation, or judicial precedent.

A lawyer who practices law in this jurisdiction is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may be required to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, such disclosure may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

Paragraphs (c) and (d) do not authorize lawyers who are admitted to practice in other jurisdictions to advertise legal services to prospective clients in this jurisdiction. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

Staff Comment: The amended rule sets specific guidelines for out-of-state lawyers who are appearing temporarily in Michigan, and is intended to work in conjunction with MRPC 8.5. See, also, MCR 8.126 and MCR 9.108(E)(8).

RULE 5.7. RESPONSIBILITIES REGARDING LAW-RELATED SERVICES.

(a) A lawyer shall be subject to the Michigan Rules of Professional Conduct with respect to the provision of

law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed, and regardless of whether the

law-related services are performed through a law firm or a separate entity. This rule identifies the circumstances in which all the Michigan Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those rules that apply generally to lawyer conduct, regardless whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer providing the law-related services must adhere to the requirements of the Michigan Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Michigan Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, this rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Michigan Rules of Professional Conduct that relate to the client-lawyer relation-

ship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Michigan Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made, preferably in writing, before law-related services are provided or before an agreement is reached for provision of such services.

The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient

will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances, the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the rule cannot be met. In such a case, a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls, comply in all respects with the Michigan Rules of Professional Conduct.

A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical, or environmental consulting.

When a lawyer is obliged to accord the recipients of such services the protections of those rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the rules addressing conflicts of interest, and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

When the full protections of all the Michigan Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest, and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Staff Comment: This is a new rule. The underlying presumption of the rule is that the Michigan Rules of Professional Conduct apply whenever a lawyer performs law-related services or controls an entity that performs law-related services. The accompanying commentary explains that the presumption may be rebutted only if the lawyer carefully informs the consumer and identifies the services that are law related and clarifies that no client-lawyer relationship exists with respect to ancillary services.

RULE 6.6. NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS.

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this rule.

Comment

Legal services organizations, courts, and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services, such as advice or the completion of legal forms, that will help persons address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics, or pro se counseling programs, a client-lawyer relationship may or may not be established as a matter of law, but regardless there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9, and 1.10.

A lawyer who provides short-term limited legal services pursuant to this rule must secure the client's consent to the scope of the representation. See Rule 1.2. If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, the Michigan Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

Because a lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

If, after commencing a short-term limited representation in accordance with this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a), and 1.10 become applicable.

Staff Comment: MRPC 6.6 is a new rule. The rule addresses concerns that a strict application of conflict-of-interest rules may deter lawyers from volunteering to provide short-term legal services through nonprofit organizations, court-related programs, and similar other endeavors such as legal-advice hotlines.

RULE 8.5. ~~JURISDICTION~~ DISCIPLINARY AUTHORITY; CHOICE OF LAW.

(a) Disciplinary Authority. A lawyer ~~licensed~~ admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of ~~whether~~ where the lawyer's ~~is engaged in practice elsewhere~~ conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer

may be ~~who is licensed to practice in another jurisdiction and who is admitted to practice in this jurisdiction is~~ subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct; a lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

~~*In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5. A lawyer admitted to practice in Michigan pro hac vice is subject to the disciplinary authority of this state for actions and inactions occurring during the course of the representation of a client in Michigan.*~~

~~*If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.*~~

~~*Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.*~~

Disciplinary Authority. It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this rule. The fact that a lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer in civil matters.

Choice of Law. A lawyer potentially may be subject to more than one set of rules of professional conduct that impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interests of clients, the profession, and those who are authorized to regulate the profession. Accordingly, paragraph (b) provides that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct; makes the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions; and protects from discipline those lawyers who act reasonably in the face of uncertainty.

Paragraph (b)(1) provides, as to a lawyer's conduct relating to a proceeding pending before a tribunal, that the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred or, if the predominant effect of the conduct is in another jurisdiction, the lawyer shall be subject to the rules of that jurisdiction. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be either where the conduct occurred, where the tribunal sits, or in another jurisdiction.

When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear initially whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct actually did occur. So long as the lawyer's conduct conforms to the rules of a jurisdiction

in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this rule.

If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct and should avoid proceeding against a lawyer on the basis of inconsistent rules.

The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties, or other agreements between regulatory authorities in the affected jurisdictions provide otherwise.

Staff Comment: The amendments of MRPC 8.5 add a separate section on choice of law. The rule specifically gives discipline authorities jurisdiction to investigate and prosecute the ethics violations of attorneys temporarily admitted to practice in Michigan. The rule is intended to work in conjunction with MRPC 5.5. See, also, MCR 8.126 and MCR 9.108(E)(8).

The staff comments that appear throughout these amendments are intended to provide explanation, but are not authoritative constructions by the Court.

SUPREME COURT CASES

In re CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN (WAESCHLE v OAKLAND COUNTY MEDICAL EXAMINER)

Docket No. 140263. Argued October 7, 2010 (Calendar No. 8). Decided October 29, 2010.

Karen Waeschle, individually and on behalf of others similarly situated, brought an action in the United States District Court for the Eastern District of Michigan against, among others, the Oakland County Medical Examiner, who had retained the brain of Waeschle's deceased mother after completing her autopsy and returning the rest of her body to Waeschle. The district court denied in part defendants' motion for summary disposition and their motion to certify the underlying legal question to the Michigan Supreme Court on the ground that Waeschle had a clearly established federal constitutional property right to the decedent's brain. The United States Court of Appeals for the Sixth Circuit reversed these judgments in *Waeschle v Dragovic*, 576 F3d 539 (CA 6, 2009), and remanded the case to the district court with instructions to certify the following question to the Michigan Supreme Court:

Assuming that a decedent's brain has been removed by a medical examiner in order to conduct a lawful investigation into the decedent's cause of death, do the decedent's next-of-kin have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination?

The Supreme Court granted the request to answer the certified question pursuant to MCR 7.305(B). 485 Mich 1116 (2010).

In an opinion per curiam signed by Chief Justice KELLY and Justices CAVANAGH, CORRIGAN, MARKMAN, and HATHAWAY, the Supreme Court *held*:

Assuming that a decedent's brain was removed by a medical examiner to conduct a lawful investigation into the decedent's cause of death, the decedent's next of kin did not have a right under Michigan law to possess the brain after it was no longer needed for forensic examination. The statutory provision in effect at the relevant time, MCL 52.205(5), required only the prompt

return of the body, and it permitted a medical examiner to retain portions of the body to detect crime. It is undisputed that when this provision was enacted, the historical practice of medical examiners was to retain, examine, and later dispose of decedents' brains. No Michigan caselaw gives a decedent's next of kin a possessory right to the decedent's brain following a lawful forensic examination.

Certified question answered in the negative.

Justice YOUNG, dissenting, would decline to answer this certified question in light of its diminished legal significance after the recent amendment of the relevant statute.

Justice DAVIS, dissenting, would decline to answer the certified question because he was not persuaded that the Court should answer this certified question.

MEDICAL EXAMINERS — AUTOPSIES — RETURN OF BODY PARTS.

Under Michigan common law and statutory law before 2010 PA 108 was enacted, a decedent's next of kin had no right to possess the decedent's brain after it was no longer needed for lawful forensic examination (MCL 52.205).

Dworken & Bernstein Co., L.P.A. (by *Erik L. Walter* and *Patrick J. Perotti*), and *John H. Metz* for plaintiffs.

Giarmarco, Mullins & Horton, P.C. (by *William H. Horton* and *Elizabeth A. Favaro*), and *Keith J. Lerminiaux* for defendants.

Amici Curiae:

Steven M. Jentzen, P.C. (by *Steven M. Jentzen*), for the Michigan Association of Medical Examiners, the National Association of Medical Examiners, Wayne County, and the Michigan Association of Counties.

Daniel A. Ophoff, Corporate Counsel, for Kent County.

Kerr, Russell and Weber, PLC (by *Joanne Geha Swanson* and *Daniel J. Schulte*), for the Michigan State Medical Society.

PER CURIAM. The United States District Court for the Eastern District of Michigan certified the following question to this Court pursuant to MCR 7.305(B):

> Assuming that a decedent's brain has been removed by a medical examiner in order to conduct a lawful investigation into the decedent's cause of death, do the decedent's next-of-kin have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination?[1]

We granted the request to answer the question.[2] Having heard the parties' oral arguments, and having reviewed the briefs filed by the parties and other interested amici curiae, we answer under the law applicable to this case and the facts as presented: No, assuming that a decedent's brain was removed by a medical examiner to conduct a lawful investigation into the decedent's cause of death, the decedent's next of kin does not have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination.

At all times relevant to the underlying federal district court case, this issue was governed by MCL 52.205(5).[3] This statute provided:

> The county medical examiner shall, after any required examination or autopsy, promptly deliver or return the

---

[1] See *Waeschle v Dragovic*, 576 F3d 539, 551 (CA 6, 2009).

[2] *In re Certified Question (Waeschle v Oakland Co Med Examiner)*, 485 Mich 1116 (2010).

[3] MCL 52.205 was originally enacted in 1953 by Public Act 181. A relative's statutory "right and power to make decisions about funeral arrangements and the handling, disposition, or disinterment of a decedent's body" under Michigan's Estates and Protected Individuals Code is expressly "[s]ubject to 1953 PA 181, MCL 52.201 to 52.216 . . . ." MCL 700.3206(1). In response to this case, the Legislature amended MCL 52.205, effective July 1, 2010. 2010 PA 108. MCL 52.205(6) now specifically addresses medical examiners' duties to next of kin under the circumstances presented here.

> body to relatives . . . except that the medical examiner may retain, as long as may be necessary, any portion of the body believed by the medical examiner to be necessary for the detection of any crime.

Because the statute required only prompt return of "the body"—and because it permitted the medical examiner to retain portions of the body in order to detect crime—this law provided next of kin no clear right to the return[4] of a brain lawfully removed and retained for forensic examination after the body was returned to the decedent's family for burial or cremation. Further, plaintiff has not disputed defendants' assertions that there was an historical practice of retaining, examining, and later disposing of an examined brain when MCL 52.205 was enacted in 1953 and that medical examiners promulgated rules to permit this practice under MCL 52.201c.[5] Finally, no Michigan caselaw gives next of kin a possessory right to a decedent's brain following a lawful forensic examination.

KELLY, C.J., and CAVANAGH, CORRIGAN, MARKMAN, and HATHAWAY, JJ., concurred.

YOUNG, J. (*dissenting*). I continue to adhere to my stated position in *In re Certified Question (Wayne Co v Philip Morris Inc)*, 622 NW2d 518 (Mich, 2001), that this Court lacks the authority under state law to answer certified questions. However, my position has failed to

---

[4] Plaintiff here did not request return of the brain. We express no opinion concerning whether, before the 2010 amendment of MCL 52.205, a medical examiner would have had a duty to return a brain in response to a relative's timely request if the medical examiner had not destroyed the brain and had no further need to examine it. MCL 52.205(6) now expressly delineates a medical examiner's duties under such circumstances.

[5] MCL 52.201c was enacted by 1969 PA 92, effective July 24, 1969.

carry the day. See proposed amendment of MCR 7.305, 462 Mich 1208 (2000). While this Court has chosen to assert the right to exercise that authority, I will exercise careful discretion before answering any certified question.

In light of the recent amendment of the relevant statute by 2010 PA 108, this case now only concerns a putative class of persons whose arguable claims arose before the effective date of the amendment. Accordingly, the legal significance of the question certified by the United States District Court for the Eastern District of Michigan is considerably diminished. I would decline to answer the question in this instance.

DAVIS, J. (*dissenting*). I would decline to answer the certified question because I am not persuaded that the Court should answer this certified question.

In re BECK

Docket No. 140842. Argued October 6, 2010 (Calendar No. 12). Decided December 20, 2010.

The parental rights of Lawrence M. Beck to his two minor children were terminated pursuant to an order entered in the Oakland Circuit Court, Family Division, Martha D. Anderson, J. The order also required Beck to continue to provide child support. Beck filed a delayed application for leave to appeal in the Court of Appeals, contending that his due process rights were violated by the part of the order regarding his continuing obligation to pay child support. After granting the application, the Court of Appeals, DAVIS, P.J., and FORT HOOD and SERVITTO, JJ., affirmed, holding that involuntary termination of parental rights does not automatically extinguish the parental responsibility of paying child support. 287 Mich App 400 (2010). The Supreme Court granted Beck's application for leave to appeal. 486 Mich 936 (2010).

In a unanimous opinion by Justice YOUNG (Justice DAVIS not participating), the Supreme Court *held*:

The termination of a person's parental rights does not automatically end that person's obligation to support his or her child.

1. As a constitutional matter, parental rights encompass parents' fundamental liberty interest in the care, custody, and control of their children. Respondent's claim that his constitutional right to due process was violated by the trial court's order requiring him to pay child support after his parental rights were terminated is unsupported by any authority and therefore meritless.

2. The Legislature specifically defined parental rights and parental obligations, and it chose to address those concepts in two discrete statutory provisions in 1968 PA 293. MCL 722.2 indicates that parental rights encompass the custody, control, services, and earnings of the minor, and this provision makes no mention of parental obligations. The only parental obligation set forth in the act is found in MCL 722.3, which indicates that parents are jointly and severally obligated to support a minor unless a court of competent jurisdiction modifies or terminates the obligation or the minor is emancipated by operation of law, except as otherwise ordered. Because the parental rights identified in MCL 722.2 are

distinct and detached from the parental duty identified in MCL 722.3, it is clear that the Legislature has determined that parental rights are independent from parental duties, and nothing in either provision evinces any legislative intent that one is connected to or conditioned on the other. Accordingly, the termination of parental rights does not automatically end the obligation of support.

Affirmed.

Justice DAVIS did not participate in the decision of this case because he was on the Court of Appeals panel.

PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — CHILD SUPPORT — OBLIGATION OF PARENTS TO SUPPORT MINOR CHILDREN.

The termination of a person's parental rights does not automatically end that person's obligation to support his or her child (MCL 712A.19b, 722.3[1]).

Jessica R. Cooper, Prosecuting Attorney, *John S. Pallas*, Chief, Appellate Division, and *Thomas R. Grden*, Assistant Prosecuting Attorney, for the Department of Human Services.

H. Elliot Parnes, guardian ad litem, for the minor children.

Nancy A. Plasterer for Lawrence M. Beck.

Amici Curiae:

Vivek S. Sankaran for the University of Michigan Law School Child Advocacy Law Clinic.

Suzanne K. Hollyer for the Michigan Friend of the Court Association.

Kent Weichmann for the Family Law Section of the State Bar of Michigan.

YOUNG, J. The respondent-father in this case had his parental rights terminated pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). The sole issue respondent advanced on appeal is the propriety of the trial court's

order requiring respondent to continue paying child support after the termination of his parental rights. Respondent argues that his obligation to pay child support ended as a matter of law when his parental rights were terminated and that any continued child support obligation violated his constitutional right to due process of law. The Court of Appeals rejected respondent's argument.

We affirm the judgment of the Court of Appeals, but do so on the basis of an alternative analysis from that advanced by the Court of Appeals. The Legislature specifically defined parental rights and parental obligations, and it chose to address those concepts in two discrete statutory provisions. Thus, the statutory structure indicates the Legislature's determination that parental rights are distinct from parental obligations, and nothing in the statutory structure indicates that the loss of parental rights automatically results in the loss of parental obligations. Rather, a parental obligation continues "unless a court of competent jurisdiction modifies or terminates the obligation . . . ."[1] Because the trial court declined to modify or terminate respondent's obligation to pay child support, respondent's obligation remains intact.

FACTS AND PROCEDURAL HISTORY

Respondent's two children, AB and LB, were made temporary wards of the court in 2007 because of chronic drug abuse by both parents. Subsequently, respondent and his wife divorced, and both were ordered to pay child support while the children were in the care of their grandmother. The children were returned to their mother's care in January 2008 after she complied with the parent-agency agreement.

---

[1] MCL 722.3(1).

When respondent made no progress toward reunification with his children, the Department of Human Services filed a supplemental petition seeking termination of his parental rights. In May 2009 the trial court terminated respondent's parental rights, and further ordered that respondent's child support obligation continue pursuant to the divorce judgment.

On appeal in the Court of Appeals, respondent did not challenge the termination of his parental rights; rather, respondent only challenged his continuing obligation to pay child support. Respondent claimed that the trial court's order requiring him to pay child support after his parental rights were terminated violated his constitutional right to due process of law.

In a published opinion, the Court of Appeals rejected respondent's claim and affirmed the trial court's order.[2] The panel rejected respondent's constitutional claim because, "apart from simply asserting" a due process violation, respondent did not "explain how the trial court's decision resulted in a denial of due process . . . ."[3] Rather, the Court of Appeals treated the issue as "a straightforward question of law . . . ."[4]

The Court of Appeals reasoned that had the Legislature intended that the termination of parental rights also terminate parental obligations, it could have easily said so.[5] The panel also held that child support and parental rights are not interdependent, noting that parents should not be denied parenting time simply because they are unable to pay child support.[6] The Court of Appeals also stated that children possess "the inherent and fundamen-

---

[2] *In re Beck*, 287 Mich App 400; 788 NW2d 697 (2010).

[3] *Id*. at 402.

[4] *Id*.

[5] *Id*. at 402-403.

[6] *Id*. at 403.

tal right to receive support" and that this fundamental right exists independently from whether a parent retains parental rights.[7] The panel further noted several public policy considerations compelling the conclusion that the termination of parental rights does not automatically extinguish a child support obligation.[8]

Respondent appealed in this Court. We granted leave to appeal, asking the parties to address whether a parent whose rights have been involuntarily terminated "can nevertheless be ordered to pay child support for those children."[9]

STANDARD OF REVIEW

Whether a parent may be compelled to pay child support after his parental rights have been terminated presents a question of law that this Court reviews de novo.[10]

ANALYSIS

MCL 712A.19b pertains to the termination of parental rights. The respondent in this case had his parental

---

[7] *Id*.

[8] The panel relied on the following considerations: First, the goal of a termination of parental rights proceeding is to protect the child. Eliminating the benefit of child support would not serve to protect the child from harm originating from the parent, but would only serve to deny the child benefits based on the child's needs and the parent's ability to pay. Second, if a parent's child support obligation is extinguished, the burden of financial assistance falls on the other parent, often with the assistance of the state. Third, a parent may forgo reporting abusive or neglectful behavior of a coparent in order to preserve a child's right to receive support, which would be detrimental to the child's welfare. In addition, if the termination of parental rights automatically extinguished a child support obligation, an irresponsible parent could abuse or neglect his child in order to escape liability for child support. *Id*. at 404-405.

[9] 486 Mich 936 (2010).

[10] *Foster v Wolkowitz*, 486 Mich 356, 362; 785 NW2d 59 (2010); *State News v Mich State Univ*, 481 Mich 692, 699; 753 NW2d 20 (2008).

rights terminated pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). MCL 712A.19b(5) provides: "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." Nothing in the statutory scheme defines the scope of "termination of parental rights."

We next turn to the meaning of "parental rights." As a *constitutional* matter, parental rights encompass parents' fundamental liberty interest in "the care, custody, and control of their children."[11] Respondent makes no claim that the termination of his parental rights violated his liberty interests; rather, he claims that his "right to due process" was violated by the trial court's order requiring him to continue to pay child support after his parental rights were terminated. However, respondent cites no authority, and we have discovered none, holding that a parent has either a state or federal constitutional entitlement to have his child support obligation suspended when his parental rights have been terminated. Therefore, we find no merit in his constitutional claim.[12]

As a statutory matter, the scope of parental rights can be found in 1968 PA 293, MCL 722.1 through 722.6. This act pertains to the "status and emancipation of minors" and "rights of parents." The title of 1968 PA 293 indicates that the purpose of the act is, among other purposes, "to define the rights and duties of parents."

The term "parents" is defined in the act as the "natural parents, if married prior or subsequent to the

---

[11] *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000).

[12] In so holding, we do not purport to decide the outcomes of future cases involving due process challenges in this context.

minor's birth; adopting parents, if the minor has been legally adopted, or the mother, if the minor is illegitimate."[13]

MCL 722.2 delineates the rights of parents with respect to their unemancipated children. The statute provides:

> Unless otherwise ordered by a court order, the parents of an unemancipated minor are equally entitled to *the custody, control, services and earnings of the minor*, but if 1 parent provides, to the exclusion of the other parent, for the maintenance and support of the minor, that parent has the paramount right to control the services and earnings of the minor.[14]

Thus, MCL 722.2 defines the scope of parental rights as encompassing the "custody, control, services and earnings of the minor . . . ." Under the plain language of the statute, parental rights do not include or contemplate parental obligations.

Rather, it is the very next statutory provision that identifies the parental obligations imposed by the Legislature. The *sole* parental obligation identified in MCL 722.3 is the duty to provide a child with support:

> (1) The *parents are jointly and severally obligated to support a minor* as prescribed in section 5 of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605, *unless a court of competent jurisdiction modifies*

---

[13] MCL 722.1. Because the three types of parents described in MCL 722.1 are all legal parents, without regard to whether they share a biological connection with the minor at issue, the statutory definition describes a legal rather than biological relationship. Michigan law has *long* recognized the principle that a child born during a marriage is presumed to be the issue of that marriage. *In re KH*, 469 Mich 621, 634-635; 677 NW2d 800 (2004); *People v Case*, 171 Mich 282, 284; 137 NW 55 (1912); *Egbert v Greenwalt*, 44 Mich 245, 249-250; 6 NW 654 (1880).

[14] MCL 722.2 (emphasis added).

or terminates the obligation or the minor is emancipated by operation of law, except as otherwise ordered by a court of competent jurisdiction. Subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, a court of competent jurisdiction may order support as provided in this section for a child after he or she reaches 18 years of age.

(2) The *duty of support* may be enforced by the minor or the child who has reached 18 years of age, his or her guardian, any relative within the third degree, an authorized government agency, or if the minor or the child who has reached 18 years of age is being supported in whole or in part by public assistance under the social welfare act, 1939 PA 280, MCL 400.1 to 400.119b, by the director of the family independence agency or his or her designated representative, or by the director of the county family independence agency or his or her designated representative of the county where an action under this act is brought. An action for enforcement shall be brought in the circuit court in the county where the minor or the child who has reached 18 years of age resides. If a designated official of either the state or a county family independence agency brings an action under this act on behalf of the minor or the child who has reached 18 years of age, then the prosecuting attorney or an attorney employed by the county under section 1 of 1941 PA 15, MCL 49.71, shall represent the official in initiating and conducting the proceedings under this act. The prosecuting attorney shall utilize the child support formula developed under section 19 of the friend of the court act, 1982 PA 294, MCL 552.519, as a guideline in petitioning for child support.

(3) A judgment entered under this section providing for support is governed by and is enforceable as provided in the support and parenting time enforcement act, 1982 PA 295, MCL 552.601 to 552.650. If this act contains a specific provision regarding the contents or enforcement of a support order that conflicts with a provision in the support and parenting time enforcement act, 1982 PA 295, MCL 552.601 to 552.650, this act controls in regard to that provision.[15]

---

[15] MCL 722.3 (emphasis added).

The plain language of this provision imposes a "duty of support" on *both* parents, jointly and severally, which exists "unless a court of competent jurisdiction modifies or terminates the obligation." The parental obligation to support minor children may be enforced where *neither* parent has custody of the child,[16] and may be enforced even if the *state* has custody of the child.[17] Lastly, MCL 722.3 provides an independent basis for the entry of a child support order,[18] although any child support order entered must comport with the child support guidelines.[19]

Because the parental rights identified in MCL 722.2 are distinct and detached from the parental duty identified in MCL 722.3, it is clear that the Legislature has determined that parental rights are independent from parental duties. Nothing in either MCL 722.2 or MCL 722.3 evinces any legislative intent that either statutory provision is connected to or conditioned on the other.

---

[16] The duty of support may be enforced by the child or "his or her guardian, any relative within the third degree, [or] an authorized government agency . . . ." MCL 722.3(2).

[17] If the child "is being supported in whole or in part by public assistance under the social welfare act," the duty of support can be enforced by the Family Independence Agency, which is now the Department of Human Services. MCL 722.3(2). Foster care is included in the Social Welfare Act. See MCL 400.18c through 400.18e.

[18] See MCL 722.3(3) (stating that "[a] judgment *entered under this section* providing for support is governed by and is enforceable as provided in the support and parenting time enforcement act," and "[i]f this act contains a specific provision regarding the contents or enforcement of a support order that conflicts with a provision in the support and parenting time enforcement act, . . . this act controls in regard to that provision") (emphasis added).

[19] MCL 722.3(1) states that parents are obligated to support a minor "as prescribed in section 5 of the support and parenting time enforcement act," MCL 552.605, which requires that a child support order be determined "by application of the child support formula" unless a basis for deviating from the child support formula exists.

There is no indication that the duty of support is conditioned on the retention of parental rights, just as there is no indication that the exercise of parental rights is conditioned on fulfilling the parental obligation to support.

The plain language of the termination statute, MCL 712A.19b, only implicates "parental rights." Thus, when parental rights are terminated, what is lost are those interests identified by the Legislature *as parental rights*. In other words, the terminated parent loses any entitlement to the "custody, control, services and earnings of the minor . . . ."[20] Because nothing in the language of MCL 712A.19b affects the duty of support articulated in MCL 722.3, the obligation remains intact.

Thus, even after a parent's rights have been terminated, the obligation to support continues "unless a court of competent jurisdiction modifies or terminates the obligation . . . ."[21] This provision of MCL 722.3 indicates that a court has the *discretion* to terminate or modify a parent's obligation to provide support, but is not *compelled* to do so.[22] In this case, the trial court

---

[20] MCL 722.2.

[21] MCL 722.3(1).

[22] The parental duty to support would abate if the "minor is emancipated by operation of law . . . ." MCL 722.3(1); see also MCL 722.4(2). In contrast, when a minor is emancipated by court order, the parental duty to support continues. MCL 722.4e(2). Additionally, the parental duty to support would cease by operation of law when a child is legally adopted. See MCL 710.60(1) (stating that adoptive parents "become the parent or parents of the adoptee under the law as though the adopted person had been born to the adopting parents and are liable for all the duties and entitled to all the rights of parents"); see also MCL 722.1. Thus, under the plain language of the Adoption Code, a former parent's duty of support is terminated when a child is legally adopted because the adoptive parents are liable for all of the duties of parents. Cf. *In re Toth*, 227 Mich App 548, 553; 577 NW2d 111 (1998) (recognizing that "[t]he Michigan adoption scheme expresses a policy of severing, at law, the prior, natural family relationship and creating a new

expressly declined to modify or terminate respondent's child support obligation, and respondent has made no showing that the trial court's decision was an abuse of discretion.[23] Accordingly, respondent remains responsible for supporting his minor children.

CONCLUSION

Because the Legislature has made a clear distinction between parental rights and the parental obligation to support a minor child, and nothing in the statutory structure indicates that the termination of parental rights automatically results in the severance of the parental support duty, we hold that the support duty continues unless the duty is modified or terminated by a court of competent jurisdiction. Given that the trial court declined to modify or terminate respondent's obligation, and respondent has made no showing that this decision was an abuse of discretion, respondent's obligation remains intact.

---

and complete substitute relationship after adoption"). In the context of a pretermination guardianship, where a court may place a child with a permanent guardian in lieu of terminating the parent's rights, MCL 712A.19a(6) and (7)(c), no statutory language suggests that the duty of support would cease. See MCL 712A.19a; see also MCL 712A.19a(8) and MCL 700.5215 (stating that a guardian's rights and duties do not include an obligation to provide for the child with the guardian's own money). Similarly, no statutory language suggests that the duty of support would cease in the event of a posttermination guardianship. See MCL 712A.19c.

[23] In holding that the parental obligation to support may continue after parental rights have been terminated, we wish to reiterate that the terminated parent retains absolutely no rights with respect to the children and no right to interpose himself in the lives of his children. See, e.g., *Hunter v Hunter*, 484 Mich 247, 269; 771 NW2d 694 (2009) (stating that the termination of a parent's parental rights permanently severs the "parent's right to be a parent and make decisions regarding his or her child's upbringing"). In the absence of statutory authority, the terminated parent may not claim *any* right to see or contact the children attendant to the payment of child support.

KELLY, C.J., and CAVANAGH, CORRIGAN, MARKMAN, and HATHAWAY, JJ., concurred with YOUNG, J.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

MICHIGAN EDUCATION ASSOCIATION v SECRETARY OF STATE

Docket No. 137451. Argued November 5, 2010 (Calendar No. 7). Decided December 29, 2010. Vacated on rehearing, 489 Mich 194.

The Michigan Education Association (MEA) sought a declaratory ruling by the Secretary of State that a payroll-deduction plan by the Gull Lake Public Schools for employee contributions to the MEA's political action committee (MEA-PAC) pursuant to the terms of a collective-bargaining agreement between the Kalamazoo County Education Association/Gull Lake Education Association and the school district, under which the MEA would reimburse the district in advance for the cost of administering the payroll-deduction plan, would not violate § 57 of the Michigan Campaign Finance Act (MCFA), MCL 169.257. That provision prohibits a public body from using or authorizing the use of funds or other public resources to, among other things, make a contribution or expenditure as defined by the MCFA. The Secretary of State declared that the payroll-deduction plan in question would violate MCL 169.257. The MEA petitioned the Ingham Circuit Court for judicial review of the declaratory ruling. The court, Thomas L. Brown, J., determined that the declaratory ruling was arbitrary, capricious, and an abuse of discretion, concluding that the school district cannot be said to make an expenditure by administering the payroll-deduction plan if it is reimbursed in advance for the costs of doing so. The Secretary of State appealed by leave granted, and the Court of Appeals, WILDER, P.J., and O'CONNELL, J. (WHITBECK, J., dissenting), reversed. 280 Mich App 477 (2008). The Supreme Court granted the MEA's application for leave to appeal. 486 Mich 952 (2010).

In an opinion by Justice HATHAWAY, joined by Chief Justice KELLY and Justices CAVANAGH and DAVIS, the Supreme Court *held*:

A public school's administration of a payroll-deduction system that remits money to a segregated fund is not precluded by the prohibition in MCL 169.257(1) against using public resources to make an expenditure, make a contribution, or provide certain volunteer personal services in connection with campaign financing.

1. The administration of such a payroll-deduction system is not an expenditure under the MCFA because it is an expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee, which is a specific, enumerated exception to the general, expansive statutory definition of "expenditure." This exception is contained within the definitional provisions of the MCFA, and it includes no language that would limit its application to those sections of the MCFA that deal only with private entities and political action committees.

2. The administration of the system is not a contribution as defined by the MCFA because there is no net conveyance of anything of monetary value made for the purpose of influencing the nomination or election of a candidate or for the qualification, passage, or defeat of a ballot question. The statutory definition of "contribution" includes the term "expenditure," which specifically excludes expenditures for the establishment, administration, or solicitation of contributions to a separate segregated fund like the one at issue. The definition of "contribution" also includes a transfer of anything of ascertainable monetary value for the purpose of influencing the nomination or election of a candidate or for the qualification, passage, or defeat of a ballot question. The statute does not define "transfer," but its plain meaning is to convey or remove from one entity to another. In the context of the MCFA, "contribution" must be interpreted to require a net conveyance of anything of monetary value because interpreting it to include services that are fully paid for would lead to absurd results. This interpretation comports with that portion of the provision that excludes contributions that are rejected, returned, or refunded from the statutory definition of "contribution." "Contribution" also includes the granting of discounts or rebates not available to the general public, which implies that products or services provided at full price are not contributions under the MCFA. Additionally, a public school's administration of a payroll-deduction system is not an impermissible contribution under the MCFA because the system is not administered for the purpose of influencing the nomination or election of a candidate or for the qualification, passage, or defeat of a ballot question; rather, the system is administered because the public body is required to do so as part of a labor contract, and it merely allows someone else to make a contribution for the purpose of influencing a political issue.

3. A public school's administration of such a payroll-deduction system does not provide volunteer personal services that are excluded from the definition of "contribution" under MCL 169.204(3)(a) because the plain meaning of "volunteer" is a person who performs a service without pay, and the MEA-PAC fully anticipates prepayment of any administration costs.

Reversed.

Justice MARKMAN, joined by Justices CORRIGAN and YOUNG, dissenting, would affirm the judgment of the Court of Appeals on the ground that the school district's administration of the payroll deduction plan in this case constitutes both a contribution and an expenditure as defined by the MCFA because public resources are being used to advance the political objectives of the MEA-PAC and public services and facilities in assistance of these same political objectives are being provided. He would hold that the MEA-PAC's offer to reimburse the school district for expenses incurred in its administration of the plan does not remedy an otherwise clear violation of MCL 169.257, which states that a public body shall not use or authorize the use of its public resources to make a contribution or expenditure. He further stated that the majority's contrary interpretation undermines the legislative objective of § 57, which is to mandate the separation of the government from politics in order to maintain governmental neutrality in elections, preserve fair democratic processes, and prevent taxpayer funds from being used to subsidize partisan political activities.

ELECTIONS — MICHIGAN CAMPAIGN FINANCE ACT — CONTRIBUTIONS TO POLITICAL ACTION COMMITTEES — PUBLIC BODIES — PAYROLL DEDUCTION PLANS.

A public school's administration of a payroll deduction system that remits money to a political action committee that is a segregated fund is not precluded by the statutory prohibition against using public resources to make an expenditure, make a contribution, or provide certain volunteer personal services in connection with campaign financing (MCL 169.204[3], 169.255, 169.257).

White, Schneider, Young & Chiodini, P.C. (by *Kathleen Corkin Boyle*), for petitioner.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Heather S. Meingast*, *Denise C. Barton*, and *Ann Sherman*, Assistant Attorneys General, for respondent.

Amici Curiae:

Foster, Swift, Collins & Smith, P.C. (by *Eric E. Doster*), for the Michigan Chamber of Commerce.

Sachs Waldman, P.C. (by *Andrew Nickelhoff*), for Michigan State AFL-CIO; SEIU Michigan State Council; and International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America.

Patrick J. Wright for the Mackinac Center for Public Policy.

HATHAWAY, J. At issue in this case is whether a public school may administer payroll deductions for its employees who remit funds to the Michigan Education Association Political Action Committee (MEA-PAC), a segregated fund under MCL 169.255.

We conclude that the Court of Appeals clearly erred by holding that administration of a payroll deduction system is not allowed under Michigan law. We reverse the Court of Appeals' judgment because a public school's administration of a payroll deduction system (the system) that remits funds to a segregated fund is not precluded by any prohibition in MCL 169.257(1) and is therefore permitted.

MCL 169.257(1), commonly referred to as § 57 of the Michigan Campaign Finance Act (MCFA),[1] specifically prohibits a public body from using public resources to do three things: (1) make an expenditure, (2) make a contribution, and (3) "provide volunteer personal services that are excluded from the definition of contribution under section 4(3)(a)" of the MCFA, MCL

[1] MCL 169.201 *et seq*.

169.204(3)(a).[2] First, the administration of such a system is not an "expenditure" under the MCFA because the cost of administration is an "expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee,"[3] which is an enumerated exception to the statutory definition of "expenditure." Second, administration of the system is not a "contribution" as defined by the MCFA because there is no net conveyance of anything of monetary value made for the purpose of influencing the nomination or election of a candidate or for the qualification, passage, or defeat of a ballot question. Last, a public school's administration of a payroll deduction system does not "provide volunteer personal services that are excluded from the definition of contribution under section 4(3)(a)"[4] as defined by the MCFA because the MEA-PAC fully anticipates prepayment for any administration costs. Thus, the administration of a payroll deduction system by a public school is permitted under the MCFA.

I. FACTS AND PROCEEDINGS

Petitioner, the Michigan Education Association (MEA), is a voluntary, incorporated labor organization that represents members employed by public schools, colleges, and universities throughout Michigan. The MEA's political action committee, MEA-PAC, is a separate segregated fund under § 55 of the MCFA. MCL 169.255. According to the MEA, the MEA-PAC is funded in part by MEA member payroll deductions. The MEA (or its affiliates) has entered into collective bargaining agreements with various

[2] MCL 169.257(1).

[3] MCL 169.206(2)(c).

[4] MCL 169.257(1).

public school districts throughout the state that require the school district employer to administer a payroll deduction plan for contributions to the MEA-PAC. The current case involves such an agreement between the Kalamazoo County Education Association/Gull Lake Education Association and the Gull Lake Public Schools. The Gull Lake collective bargaining agreement also requires the Gull Lake Public Schools to make other payroll deductions, such as the payment of MEA dues and service fees. The MEA plans to pay the Gull Lake Public Schools, in advance, for all anticipated costs to Gull Lake Public Schools attributable to administering payroll deductions to the MEA-PAC or any other separate segregated fund affiliated with the MEA. The MEA contends that under this proposal, Gull Lake Public Schools would not incur any costs or expenses in administering the requested deductions because the Gull Lake Public Schools would be paid in advance for such costs and expenses.

As a condition to implementing the collective bargaining agreement, a representative of the Gull Lake Public Schools requested that the MEA obtain a declaratory ruling on the validity of the payroll deduction system. On August 22, 2006, the MEA filed a request for a declaratory ruling with respondent, the Secretary of State. The MEA detailed its proposal for payroll deductions to be made by the Gull Lake Public Schools and asserted that the administration of the payroll deductions by the school district would not be an "expenditure" under the MCFA and would not violate § 57 of the MCFA, MCL 169.257. The MEA requested that the Gull Lake Public Schools be allowed to make and transmit payroll deductions requested by MEA members to MEA-PAC as long as the members had filled out voluntary consent forms and

either the MEA or the MEA-PAC had paid the school district, in advance, for any costs associated with administering those payroll deductions. The MEA also asked the Secretary of State for a declaratory ruling on what costs it should consider in determining the costs attributable to administering the payroll deductions that are to be transmitted to the MEA-PAC.

On November 20, 2006, the Secretary of State ruled that the Gull Lake Public Schools could not make and transmit payroll deductions requested by MEA members to the MEA-PAC because § 57 of the MCFA prohibits a public body from making expenditures or collecting contributions for a political action committee. The ruling noted that the Department of State and the Attorney General had both previously concluded that a public body is prohibited from collecting and remitting contributions to a committee through its administration of a payroll deduction plan. The ruling explained that § 55 of the MCFA allows named private entities to make expenditures for the establishment and administration and solicitation of contributions to a separate segregated fund. However, the ruling stated that no explicit provision in the MCFA authorizes a public body to do so and concluded that the school district is prohibited from expending governmental resources for a payroll deduction plan that deducts wages from its employees on behalf of the MEA-PAC.

The Secretary of State's ruling further concluded that paying the costs of administering the payroll deductions in advance would not effectively avoid a violation of § 57. This conclusion was based on an analysis of this issue in a recent opinion of the Attorney General. OAG, 2005-2006, No 7187, p 81

(February 16, 2006). Because the Secretary of State concluded that administration of a payroll deduction system would violate the MCFA, the ruling did not address what costs should be considered attributable to administering the payroll deductions or the dollar amount that should be prepaid.

The MEA petitioned for review of the declaratory ruling in the Ingham Circuit Court. On September 4, 2007, the trial court issued an opinion setting aside the declaratory ruling on the grounds that it was arbitrary, capricious, and an abuse of discretion. The trial court opined that if the costs of administration are paid in advance, administration of payroll deductions does not result in transfer of money to a union's political action committee and, therefore, an "expenditure" has not been made within the meaning of the MCFA. Thus, the trial court held that a public body may administer payroll deductions as long as all the costs of making deductions are paid in advance.

The Secretary of State applied for leave to appeal in the Court of Appeals, which was granted. In a split decision, the Court of Appeals reversed the trial court's opinion and held that, regardless of advance payment for the associated costs, a public school's administration of a payroll deduction system is still an "expenditure" under the MCFA and thus prohibited.[5] Judge WHITBECK dissented, and would have held that administration of a payroll deduction system is not an "expenditure"[6] as the MCFA defines it.

The MEA sought leave to appeal in this Court. This Court granted oral argument on whether to grant the

---

[5] *Mich Ed Ass'n v Secretary of State*, 280 Mich App 477, 486-487; 761 NW2d 234 (2008).

[6] *Id*. at 490.

application[7] and subsequently granted leave to appeal.[8]

II. ANALYSIS

The issue in this case is whether § 57 of the MCFA, MCL 169.257(1), prohibits a public school from administering a payroll deduction system that remits funds to the MEA-PAC. This is an issue of statutory construction, which we review de novo.[9]

To interpret the MCFA, we apply the established rules of statutory construction. "Assuming that the Legislature has acted within its constitutional authority, the purpose of statutory construction is to discern and give effect to the intent of the Legislature."[10]

---

[7] *Mich Ed Ass'n v Secretary of State*, 483 Mich 1001 (2009). The Court directed the parties to brief

> (1) whether a school district's use of government resources for a payroll deduction plan for contributions made by members of the . . . Michigan Education Association (MEA) to MEA's political action committee is either an "expenditure" or a "contribution" under § 6 of the Michigan Campaign Finance Act (MCFA), MCL 169.206; (2) whether § 57(1) of the MCFA, MCL 169.257(1), prohibits a school district from expending government resources for such a payroll deduction plan if the costs of the plan are prepaid by the MEA; and (3) whether a school district has the authority to collect and deliver payroll deductions for such contributions. [*Id*.]

[8] *Mich Ed Ass'n v Secretary of State*, 486 Mich 952 (2010). In the order granting leave to appeal, this Court asked the parties to include among the issues to be briefed the effect, if any, of *Citizens United v Fed Election Comm*, 558 US__; 130 S Ct 876; 175 L Ed 2d 753 (2010), on this case. We note that because the issues presented in this case can be resolved under Michigan law, we do not opine on the application of United States Supreme Court caselaw.

[9] *In re Investigation of March 1999 Riots in East Lansing*, 463 Mich 378, 383; 617 NW2d 310 (2000).

[10] *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009), citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

Accordingly, a Court must interpret the language of a statute in a manner that is consistent with the legislative intent.[11] In determining the legislative intent, the actual language of the statute must first be examined.[12] "As far as possible, effect should be given to every phrase, clause, and word in the statute."[13] When considering the correct interpretation, a statute must be read as a whole.[14] Individual words and phrases, while important, should be read in the context of the entire legislative scheme.[15] In defining particular words within a statute, a court "must 'consider both the plain meaning of the critical word or phrase as well as "its placement and purpose in the statutory scheme." ' "[16] When a statute explicitly defines a term, the statutory definition controls.[17]

In applying these established rules of statutory construction, we start our analysis with a review of the relevant statutory language. Section 57 of the MCFA, MCL 169.257(1), prohibits public bodies from using public resources to make expenditures, contributions, or provide volunteer services that are excluded from the definition of "contribution" under § 4(3)(a) of that act, MCL 169.204(3)(a). The statute provides in pertinent part:

> A public body or an individual acting for a public body shall not use or authorize the use of funds, personnel, office

---

[11] *Potter*, 484 Mich at 411.

[12] *Id*. at 410.

[13] *Sun Valley*, 460 Mich at 237.

[14] See *id*.

[15] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008).

[16] *Id*., quoting *Sun Valley*, 460 Mich at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

[17] *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996).

> space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources *to make a contribution or expenditure or provide volunteer personal services* that are excluded from the definition of contribution under section 4(3)(a). [MCL 169.257(1) (emphasis added).]

Thus, § 57 specifically prohibits a public body from using, or authorizing the use of, public resources to do three things: (1) make an expenditure, (2) make a contribution, or (3) provide volunteer services that are excluded from the definition of "contribution" under § 4(3)(a). The plain language of the statute does not prohibit any other activity. Therefore, if the administration of the payroll deduction system is not tantamount to doing one of these three things, the administration of the system is permissible under Michigan law.

A. EXPENDITURE

We first examine whether a public school's administration of a payroll deduction system that remits funds to the MEA-PAC is an impermissible expenditure under § 57. "Expenditure" is specifically defined by the MCFA, so this definition controls for purposes of applying § 57. The general definition of "expenditure" under the MCFA is set forth in § 6, which provides in pertinent part:

> (1) "Expenditure" means a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question. Expenditure includes, but is not limited to, any of the following:
>
> (a) A contribution or a transfer of anything of ascertainable monetary value for purposes of influencing the nomi-

> nation or election of a candidate or the qualification, passage, or defeat of a ballot question.
>
> * * *
>
> (2) *Expenditure does not include any of the following:*
>
> (a) An expenditure for communication by a person with the person's paid members or shareholders and those individuals who can be solicited for contributions to a separate segregated fund under [MCL 169.255].
>
> * * *
>
> (c) *An expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee.* [MCL 169.206 (emphasis added).]

Thus, MCL 169.206(1) details the general definition of "expenditure," which is expansive. It includes a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question. The definition also includes a contribution or a transfer of anything of ascertainable monetary value for purposes of influencing the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question. However, despite its expansive scope, the statutory definition of "expenditure" contains explicit exceptions under MCL 169.206(2), outlining items that cannot be considered an expenditure under the MCFA even though they may qualify under the expansive general definition outlined in MCL 169.206(1).

We now consider whether a public school's administration of a payroll deduction system is an "expendi-

ture" as defined by the MCFA. The administration of a payroll deduction system does arguably provide services to the MEA and the MEA-PAC in facilitating payroll deductions from members by providing personnel and computer services. The system allows MEA members to authorize the school to automatically deduct money from their paychecks and remit the funds to the MEA-PAC. The MEA-PAC is a separate segregated fund under MCL 169.255 because it has been established by the MEA, a labor organization, to make contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, political committees, and independent committees.[18] Thus, the payroll deduction system administers member contributions to a separate segregated fund. Although this process falls within the general definition of "expenditure" under MCL 169.206(1), the administration of such a system is explicitly excluded from the statutory definition under MCL 169.206(2)(c). To reiterate, MCL 169.206(2)(c) *excludes* from the definition of "expenditure" any "expenditure for the establishment, administration, or solicitation of contributions to *a separate segregated fund or independent committee*."[19] A public school's administration of a payroll deduction falls squarely within the statutory exception. The sys-

[18] MCL 169.255(1) provides, in pertinent part:

> A corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization formed under the laws of this or another state or foreign country may make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. A separate segregated fund established under this section shall be limited to making contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, political committees, and independent committees.

[19] MCL 169.206(2)(c).

tem is set up to facilitate MEA member contributions to their separate segregated fund, the MEA-PAC. Therefore, the administration of the system is *not* an "expenditure" under the MCFA.

The Secretary of State argues that the statutory exception in MCL 169.206(2)(c) should not be applied to public bodies because the Legislature intended to treat public bodies differently from private entities and political action committees under the MCFA. However, this argument disregards the plain language of the statute. MCL 169.206(2)(c) is contained within the definitional provisions of the MCFA and includes no language limiting its application to sections of the MCFA that deal only with private entities and political action committees. MCL 169.201(2), on the other hand, explicitly mandates that "[e]xcept as otherwise defined in this act, the words and phrases defined in [MCL 169.202 to 169.212] shall, for the purposes of this act, have the meanings ascribed to them in those sections." Thus, the statutory definition of "expenditure" controls and applies to the entire MCFA, including § 57, exceptions and all.

The Court of Appeals clearly erred by holding that a public school's administration of a payroll deduction system is an expenditure. Without providing any independent statutory analysis, the Court of Appeals concluded that the administration of the system is an expenditure by relying solely on the Secretary of State's prior interpretation of the term. The Court of Appeals reasoned:

> The Secretary previously issued an interpretive statement indicating that "the department interprets the term 'expenditure' to include the costs associated with collecting and delivering contributions to a committee" and that "[a] payroll deduction system is one method of collecting and

> delivering contributions." Interpretative Statement to Mr. Robert LaBrant (November 14, 2005).[20]

Without any independent statutory analysis, the Court of Appeals then concluded: "We find nothing in the plain language of the MCFA that indicates reimbursement negates something that otherwise constitutes an expenditure."[21]

The Court of Appeals erred by considering whether a supposedly illegal expenditure could be cured without first analyzing whether the Secretary of State's interpretation of the term "expenditure" comported with the statute. The Secretary of State's interpretation of the MCFA is not binding on the judiciary, and the Court of Appeals should have independently considered whether the administration of a payroll deduction system is an "expenditure." [22] Most importantly, the Secretary of State's interpretation of "expenditure" is incorrect because it directly conflicts with the relevant statutory language. The Secretary of State's interpretation of "expenditure" includes costs associated with collecting and delivering contributions to a committee. But, as previously explained, the statutory definition of "expenditure" explicitly excludes these costs. As a result, the Court of Appeals clearly erred by adopting respondent's interpretation of "expenditure." The plain language of the statute dictates that the administration costs at issue are excluded from the statutory term "expenditure."

Administration of a payroll deduction system is an "expenditure for the establishment, administration, or

---

[20] *Mich Ed Ass'n*, 280 Mich App at 486.

[21] *Id*.

[22] This Court is not bound by the Secretary of State's interpretations of the law or by Attorney General opinions. See *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 412; 185 NW2d 9 (1971).

solicitation of contributions to a separate segregated fund or independent committee," and thus is an enumerated exception to the statutory definition of "expenditure." Therefore, the administration of the payroll deduction system is not an "expenditure" as defined by the MCFA and is not prohibited by § 57 on that ground.

B. CONTRIBUTION

We next examine whether a public school's administration of a payroll deduction system is an impermissible "contribution" under the MCFA.[23] "Contribution," like "expenditure," is specifically defined by the MCFA, and this definition controls for purposes of application to § 57. The definition of "contribution" under the MCFA is set forth in MCL 169.204, which provides:

> (1) "Contribution" means a payment, gift, subscription, assessment, *expenditure*, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, *or a transfer of anything of ascertainable monetary value* to a person, *made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question*.
>
> (2) Contribution includes the *full purchase price* of tickets or payment of an attendance fee for events such as dinners, luncheons, rallies, testimonials, and other fundraising events; an individual's own money or property other than the individual's homestead used on behalf of that individual's candidacy; the granting of discounts or rebates not available to the general public; or the granting of discounts or rebates by broadcast media and newspapers

[23] Although the Court of Appeals did not consider whether administration of the payroll deduction system is a contribution, we nevertheless discuss the issue because it is another statutory basis for an argument that the administration of a payroll deduction system might be impermissible and the litigants have briefed and argued the issue before this Court.

not extended on an equal basis to all candidates for the same office; and the endorsing or guaranteeing of a loan for the amount the endorser or guarantor is liable.

(3) *Contribution does not include any of the following*:

(a) Volunteer personal services provided without compensation, or payments of costs incurred of less than $500.00 in a calendar year by an individual for personal travel expenses if the costs are voluntarily incurred without any understanding or agreement that the costs shall be, directly or indirectly, repaid.

(b) Food and beverages, not to exceed $100.00 in value during a calendar year, which are donated by an individual and for which reimbursement is not given.

(c) *An offer or tender of a contribution if expressly and unconditionally rejected, returned, or refunded in whole or in part within 30 business days after receipt.* [Emphasis added.]

The statutory definition of "contribution" includes the term "expenditure." Because "expenditure" is explicitly defined by the MCFA, the statutory definition controls.[24] We have already explained why the administration of a payroll deduction system is not an "expenditure" under the MCFA and thus cannot be a contribution on that basis. The only other way that the administration of the system could be a "contribution" under the MCFA would be if administering the system resulted in a "transfer of anything of ascertainable monetary value . . . made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question."

The Secretary of State argues that the actual and intangible costs associated with the administration of a payroll deduction system constitute a contribution because there is a transfer of something of ascertainable

[24] *Tryc*, 451 Mich at 136.

monetary value from the school district to the MEA-PAC and the transfer, although made pursuant to a collective bargaining agreement, is made for the purpose of influencing the nomination or election of a candidate or for the qualification, passage, or defeat of a ballot question. The Secretary of State asserts that the labor and computer resources that are expended to administer the payroll deduction system have an ascertainable monetary value, and the fact that they are expended for the benefit of the MEA-PAC conveys value to the MEA-PAC. The Secretary of State further argues that prepayment for the services does not negate the transfer because MEA-PAC still receives the benefit of the services.

We disagree with this interpretation of the word "transfer" in the statute. Because "transfer" is a nontechnical word that is not defined within the statute, we first look to the plain meaning of the term to ascertain what the Legislature intended by using "transfer" to define a "contribution."[25] The first dictionary definition of "transfer" is "to convey or remove from one place, person, etc., to another."[26] In order for there to be a contribution, "anything of ascertainable monetary value" must be conveyed from one entity to another.

There are two competing ways in which to interpret the word "transfer" in the statute. The first way to read the statute would require that any conveyance of value for services provided to a campaign, regardless of whether the services are paid for, would constitute a contribution. The second way to read the statute would require a net conveyance of value in order to be a "transfer of anything of ascertainable monetary value."

---

[25] MCL 8.3a; *Oakland Co Bd of Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998).

[26] *Random House Webster's College Dictionary* (1997).

We conclude that the statute must be read to require a net conveyance of monetary value, as opposed to a mere exchange of value. Any other interpretation of "contribution" would lead to an absurd result, and statutes must be construed to prevent absurd results.[27] For example, if the statute were to be interpreted in the manner the Secretary of State suggests, then a print shop that sells signage to a campaign in the normal course of business would be making a contribution to the campaign because it has transferred something of monetary value to the campaign, even though the shop has been compensated for the cost of providing the signage. Such an interpretation of "contribution" would defy common sense, and we do not read the statute in this manner. Instead, we conclude that the statute requires a net conveyance of "anything of monetary value" in order for there to be a campaign contribution. If costs for administering the payroll deduction system are paid in advance, there is no net conveyance of anything of monetary value, and there is no contribution.

Furthermore, our conclusion that a "contribution" under MCL 169.204(1) requires a net transfer of value comports with the remainder of that section, which specifically *excludes* from the statutory definition of "contribution" any "contribution if expressly and unconditionally rejected, returned, or refunded in whole or in part within 30 business days after receipt." MCL 169.204(3)(c). In other words, if the contribution is rejected, returned, or refunded, it is no longer a "contribution" under the MCFA. Moreover, MCL 169.204(2) explains that a "contribution" includes "the granting of discounts or rebates not

[27] *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

available to the general public . . . ." This implies that when an entity provides products or services at full price, the entity is not making a contribution. Thus, the statute clearly requires that there be a net transfer of value in order for there to be a contribution under the MCFA.

The MEA plans to prepay the school district for all ascertainable costs associated with the administration of a payroll deduction system, and in fact asked the Secretary of State for a declaratory ruling regarding the costs to be prepaid. The administration of the payroll deduction system will not result in a net transfer of anything of ascertainable monetary value as all costs will be ascertained and prepaid. Accordingly, there is no contribution under the MCFA, and a public school's administration of a payroll deduction system is not prohibited by § 57 on that ground.

Additionally, a public school's administration of a payroll deduction system is not an impermissible contribution under the MCFA because the system is not administered "for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question."[28] When a public body administers a payroll deduction plan, it does not do so in an attempt to influence a political race or a ballot question. Rather, administering the plan is one step removed: it merely allows *someone else* to make a contribution for the purpose of influencing a political issue. The public body administers the plan simply because it is required to do so as part of a labor contract between the public body and its employees. Consequently, because a public school's administration of a payroll deduction system is not done for the purpose of

[28] MCL 169.204(1).

influencing a political issue, the administration of the system is not a contribution under the MCFA.[29]

C. VOLUNTEER PERSONAL SERVICES

Lastly, we examine whether a public school's administration of a payroll deduction system impermissibly "provide[s] volunteer personal services that are excluded from the definition of contribution under section 4(3)(a)" of the MCFA. As noted above, § 4(3) provides:

> Contribution does not include any of the following:
>
> (a) Volunteer personal services provided without compensation, or payments of costs incurred of less than $500.00 in a calendar year by an individual for personal travel expenses if the costs are voluntarily incurred without any understanding or agreement that the costs shall be, directly or indirectly, repaid. [MCL 169.201(3).]

Although such services are thus not considered a contribution for purposes of the rest of the MCFA, § 57 specifically indicates that public bodies cannot use public resources to provide volunteer services that are not compensated. However, the administration of the payroll deduction system at issue does not involve volunteer services by public employees because the

---

[29] A public body has the authority to administer payroll deduction plans. The wages and fringe benefits act, MCL 408.477, provides that

> [e]xcept for those deductions required or expressly permitted . . . by a collective bargaining agreement, an employer shall not deduct from the wages of an employee, directly or indirectly, any amount including an employee contribution to a separate segregated fund established . . . under [MCL 169.255] without the full, free and written consent of the employee . . . .

Thus, under the plain language of MCL 408.477, public bodies have the authority to administer a payroll deduction plan that contributes money to the MEA-PAC if the MEA enters into a collective bargaining agreement that expressly permits the deductions.

MEA intends to prepay for all services rendered. Because volunteer services are not defined by the statute, we again look to the plain meaning of the terms to discern the legislative intent. Dictionary definitions of "volunteer" include "a person who performs a service willingly and without pay."[30] Willingness to perform an activity is not enough to fall within the scope of this subsection; the activity must also be performed without pay. In this case, the MEA fully anticipates payment and plans to prepay for any administration costs. As a result, a public school's administration of a payroll deduction system does not "provide volunteer personal services that are excluded from the definition of contribution under section 4(3)(a)" of the MCFA and is not prohibited by § 57 on this final ground. Therefore, the administration of a payroll deduction system by a public school is permitted under the MCFA.

III. CONCLUSION

A public school may administer payroll deductions for its employees who remit funds to the MEA-PAC, because MCL 169.257(1) only prohibits a public body from using public resources to do three things: (1) make an expenditure, (2) make a contribution, and (3) provide volunteer personal services that are excluded from the definition of "contribution" under MCL 169.204(3)(a). First, the administration of the system at issue is not an "expenditure" under the MCFA because the cost of administration is an "expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee,"[31] which is an enumerated exception to the statutory definition of "expenditure." Second, adminis-

[30] *Random House Webster's College Dictionary* (1997).

[31] MCL 169.206(2)(c).

tration of the system is not a "contribution" as defined by the MCFA because there is no net conveyance of anything of monetary value made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question. Last, a public school's administration of a payroll deduction system does not "provide volunteer personal services that are excluded from the definition of contribution under [MCL 169.204(3)(a)]" because the MEA-PAC fully anticipates prepayment for any administration costs. Thus, the administration of a payroll deduction system by a public school is permitted under the MCFA, and the Court of Appeals erred by concluding that it is not. We reverse the judgment of the Court of Appeals.

Reversed.

KELLY, C.J., and CAVANAGH and DAVIS, JJ., concurred with HATHAWAY, J.

MARKMAN, J. (*dissenting*). The issue in this case concerns the Legislature's mandated separation of the government from politics in order to maintain governmental neutrality in elections, preserve fair democratic processes, and prevent taxpayer funds from being used to subsidize partisan political activities. The Michigan Campaign Finance Act (MCFA) prohibits a "public body" from using public resources to make any "contribution or expenditure" for political purposes. MCL 169.257(1). The majority concludes that a school district's administration of a payroll deduction plan that remits funds to the Michigan Education Association's Political Action Committee (MEA-PAC) "is not precluded by any prohibition in MCL 169.257(1) and is therefore permitted." *Ante* at 21. I respectfully dissent, and believe that a school district's administration of a

payroll deduction plan that remits funds to a partisan political action committee (a) constitutes a "contribution" because public resources are being used to advance the political objectives of the committee and (b) constitutes an "expenditure" because public "services" and "facilities in assistance of" these same political objectives are being provided. Thus, the school district's payroll deduction plan is prohibited by § 57 of the MCFA, MCL 169.257. This interpretation is consistent not only with the language of the statute, but also with the evident purpose of § 57, which is to mandate the separation of the government from politics in order to maintain governmental neutrality in elections, preserve fair democratic processes, and prevent taxpayer funds from being used to subsidize partisan political activities. Accordingly, I would affirm the judgment of the Court of Appeals.

I. FACTS AND HISTORY

Petitioner, the Michigan Education Association (MEA), is a voluntary, incorporated labor organization that represents approximately 136,000 members employed by public schools, colleges, and universities throughout Michigan. The MEA-PAC is a separate segregated political fund established by the MEA in accordance with § 55 of MCFA, MCL 169.255. The MEA-PAC is significantly funded by payroll deductions of MEA members who have authorized the deductions. The purpose of the MEA-PAC is to facilitate and coordinate the involvement of the MEA in politics, by electing candidates favored by the MEA and by furthering the enactment of MEA legislative and executive policy initiatives.

As a public-employee labor organization, the MEA has entered into collective bargaining agreements with

various public school districts across the state. Some number of these agreements, including that between the MEA's locally affiliated Kalamazoo County/Gull Lake Education Associations and the Gull Lake Community Schools (the school district), require that a school district administer a payroll deduction plan for the contributions of MEA members to the MEA-PAC. In return, the MEA pays the school district the costs of the plan's administration.

On August 22, 2006, the MEA filed a request for a declaratory ruling with respondent, the Secretary of State, to determine whether the school district could continue to make and transmit payroll deductions to the MEA-PAC.[1] Respondent ruled that, absent express statutory authority, the school district is prohibited from expending public resources for a payroll deduction plan on behalf of the MEA-PAC. The MEA appealed to the circuit court, which held that respondent's ruling was "arbitrary, capricious and an abuse of discretion," reasoning that, although the school district's administration of the plan constitutes an "expenditure" under MCFA, when the costs of administering the plan have been reimbursed, "no transfer of money to the MEA-PAC has occurred, and therefore an 'expenditure' has not been made within the meaning of the MCFA."

In a split decision, the Court of Appeals reversed, holding that § 57 of MCFA prohibits a "public body," such as a school district, from using public resources "to make a contribution or expenditure." According to the Court, the costs associated with the plan constitute an "expenditure," and the reimbursement of such costs does not alter that conclusion. *Mich Ed Ass'n v Secre-*

[1] The Secretary of State is authorized to issue declaratory rulings to implement the Michigan Campaign Finance Act, MCL 169.201 *et seq*., in accordance with the Administrative Procedures Act, MCL 24.201 to 24.328.

tary of State, 280 Mich App 477, 486; 761 NW2d 234 (2008). The MEA then sought leave to appeal in this Court. On November 5, 2009, we heard oral arguments on the application, and nearly seven months later we granted the MEA's application for leave to appeal.[2]

II. STANDARD OF REVIEW

The interpretation of statutes constitutes a question of law that this Court reviews de novo on appeal. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

III. PURPOSE OF § 57

"It is well settled that the Legislature of this state is empowered to enact laws to promote and regulate political campaigns and candidacies." *Council No 11, AFSCME v Civil Serv Comm*, 408 Mich 385, 395; 292 NW2d 442 (1980) (citations omitted). The people of Michigan have granted the Legislature broad powers to regulate elections. Among other things, our Constitution empowers the Legislature to set forth the qualifications of electors; the time, place, and manner of elections; and limitations on terms of office. Const 1963, art 2, §§ 1 through 10. Furthermore, Const 1963, art 2, § 4 requires the Legislature to preserve the integrity of elections, providing in pertinent part:

> The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.

Charged to preserve the "purity of elections" and to "guard against abuses of the elective franchise," the

[2] See the discussion in part VI of this opinion.

Legislature enacted MCL 169.257, commonly referred to as § 57 of MCFA. Section 57 prohibits a "public body" from using public resources to "make a contribution or expenditure" for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question. The clear purpose of § 57, as reflected in its language, is to mandate the separation of the government from politics in order to maintain governmental neutrality in elections, preserve fair democratic processes, and prevent taxpayer funds from being used to subsidize partisan political activities.[3]

IV. ANALYSIS

MCL 169.257(1) provides, in pertinent part:

> A public body or an individual acting for a public body shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of contribution under [MCL 169.204(3)(a)].

There is no question that a school district constitutes a "public body" within the meaning of § 57.[4] Accord-

[3] See also, e.g., the political activities by public employees act, MCL 15.401 *et seq*. (providing that an employee of the state or local unit of government may not engage in political affairs during working hours); the Michigan Gaming Control and Revenue Act, MCL 432.201 *et seq*. (providing that members, employees, or agents of the Michigan Gaming Control Board may not engage in political activity for the duration of their employment); and Civil Service Rule 1-12.6 (prohibiting state employees from participating in political activities during working hours).

[4] MCFA defines a "public body" to include "[a] county, city, township, village, intercounty, intercity, or regional governing body; a council, school district, special district, or municipal corporation; or a board,

ingly, the issue in this case is whether a school district's administration of a payroll deduction plan that remits funds to a political action committee constitutes a "contribution or expenditure" within the meaning of the same provision. If the plan does, it is expressly prohibited.

A. "CONTRIBUTION"

MCL 169.204(1) defines a "contribution" as follows:

> "Contribution" means a payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person, made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question.[5]

An "in-kind contribution" is defined as a "contribution . . . other than money." MCL 169.209(3).

The school district's administration of the payroll deduction plan that facilitates payments to the MEA-PAC constitutes a prohibited "contribution." First, the school district uses a variety of public resources to administer the plan. For example, the school district must use its paper, pens, and copiers to develop and execute payroll deduction authorization forms; school personnel must collect, enter, and monitor the data of participating MEA members into computers and accounting software, all of which must be specifically configured to record, track, and transmit payroll deduc-

---

department, commission, or council or an agency of a board, department, commissioner, or council." MCL 169.211(6)(c).

[5] The MEA-PAC is a "person" because, as a separate segregated fund, it functions as the result of an organization or group of persons acting jointly. See MCL 169.211(1).

tions to the MEA-PAC; school personnel must then be prepared to respond to individual teachers who find it necessary from time to time to adjust or correct or withdraw their own deduction authorizations; and this process must necessarily involve the use of public office space, equipment, and employee time.

Second, the school district's administration of the payroll deduction plan constitutes something of "ascertainable monetary value" because there is inherent value to the MEA-PAC in having payroll deductions automatically taken from members' wages as opposed to requiring individual solicitations by the MEA-PAC. That there is such "ascertainable monetary value" is self-evident from the very fact that the MEA-PAC has affirmatively sought out the assistance of the school district and has litigated to the highest court of this state an appeal asserting its right to enter into the instant agreement with the school district. Parties do not typically enter into contracts absent a belief that the rights or benefits accorded them under the contract have some "ascertainable monetary value," and the instant contract seems no different. Such value can almost certainly be identified as the sum of (a) the additional contributions resulting from the ease of the payroll deduction process compared to a political contribution process in which individual solicitations must be undertaken and (b) the reduced administrative and transactional costs of the former process compared to the latter process. The MEA obviously prefers the payroll deduction process because it is a more efficient, and a more productive, process by which to secure funding for its political activities. The school district is not incidental to this process, but constitutes an indispensable element. Without the school district's contracted-for services, some lesser amount of contri-

butions would presumably be raised on behalf of the MEA-PAC, and at a greater cost.

Third, the services undertaken on behalf of the MEA-PAC are "made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question," MCL 169.204(1), because, as discussed earlier, the purpose of the MEA-PAC is to facilitate and coordinate the involvement of the MEA in partisan politics.[6] Thus, the school district's administration of the deduction plan constitutes a "contribution," as that term is defined by MCL 169.204(1).[7] Because the school district employs public

[6] The majority states that "[w]hen a public body administers a payroll deduction plan, it does not do so in an attempt to influence a political race or a ballot question." *Ante* at 37. However, the majority fails to recognize that MCL 169.204(1) defines "contribution" as "a *payment . . . made for the purpose* of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question." (Emphasis added.) Therefore, the pertinent question is not whether the "public body" *itself* is attempting to influence a political race or ballot question, but whether the *payments* that result from its administration of the payroll deduction plan are intended for that purpose. It is obvious here that the "payment[s] [are] made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question." This is the purpose that individual MEA members have in mind when they authorize payments, and it is the purpose that the MEA-PAC has in mind when it receives payments from the school district. It is equally obvious that the school district itself must be fully cognizant of this purpose both when it receives payments from individual MEA members and when it delivers payments to the MEA-PAC. The fact that the school district itself might not care whether such payments will influence a political race or ballot question does not alter that the *purpose* of these payments is to do precisely that.

[7] The majority further errs in its analysis when it concludes that administration of the plan "merely allows *someone else* to make a contribution for the purpose of influencing a political issue," *ante* at 37 (emphasis in original), i.e., the MEA member who has authorized the payroll deduction. Instead, the school district *itself* makes both a "contribution," and an "in-kind contribution," by providing valuable services to the MEA-PAC in aid and furtherance of its political activities. That is,

resources to make this "contribution," its administration of the deduction plan is a straightforward violation of § 57 of MCFA.

Moreover, the administration of the payroll deduction plan also constitutes an "in-kind contribution," defined by MCL 169.209(3), as a "contribution . . . other than money."[8] Although it is clearly possible to quantify the time spent by employees and the resources expended by the school district in administering the deduction plan, and thereby to ascertain the cost of such a "contribution" to the school district itself, it is considerably more difficult to quantify the intangible benefits that the MEA receives from the deduction plan. Moreover, it is quite certain that these benefits substantially outweigh the costs to the school district, and therefore cannot be calculated simply by reference to the school district's costs. The most significant of these is simply the extent of *access* to a district's MEA membership that is afforded to the MEA-PAC by the deduction plan. Such access avoids any need on the part of the MEA-PAC to establish its own administrative apparatus for political fundraising, vitiates its need to engage in costly mailings and alternative forms of communications with its members, and dispenses with its burden of having to process checks, money orders, or credit cards from contributors, as would have been

---

quite independently of the contributions of individual MEA members, the school district contributes something of *further* "ascertainable monetary value" to the MEA-PAC.

[8] Respondent and the amici curiae supporting her devoted a significant portion of their briefs and time at oral arguments to explaining how the school district's administration of the deduction plan amounts to an "in-kind contribution," and yet the majority fails to even address this argument. Although the majority provides no explanation or justification for this omission, I am nonetheless sympathetic to its plight. It is just too difficult sometimes to argue that an animal that looks like a duck, walks like a duck, and squawks like a duck is not a "duck."

necessary for any other solicitor of political contributions. As MEA's counsel at oral argument acknowledged, this method has proved an "effective" means to raise money. Almost certainly, the marginal administrative costs of the payroll deduction plan to the school district, which already may have in place a mechanism by which taxes and charitable contributions can be deducted from employees' paychecks, will be less than the marginal administrative costs of an equivalent plan to the MEA, which does not have a similar mechanism in place. The difference between these respective administrative costs can fairly be described as an "in-kind contribution" by the school district to the MEA-PAC, however difficult it may be to quantify in dollars. It is a "contribution . . . other than money" that is made for the "purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question."

B. "EXPENDITURE"

Section 57 of MCFA also prohibits a "public body" from using public resources to make an "expenditure." An "expenditure" is defined as

> a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question. [MCL 169.206(1).]

The school district's administration of the payroll deduction plan on behalf of the MEA-PAC constitutes a prohibited "expenditure" because the school district directly provides "services" and "facilities in assistance of" the MEA-PAC. The school district provides "services" to the MEA-PAC in its administration of the

deduction plan by developing and executing payroll deduction authorization forms; by collecting, entering, and monitoring the data of MEA members into computers and accounting software, all of which must be configured to record, track, and transmit payroll deductions to the MEA-PAC; and by accommodating individual teachers who find it necessary from time to time to adjust or correct or withdraw their deduction authorizations. Further, the school district provides "facilities in assistance of" the MEA-PAC through the use of public office space and equipment. These "services" and "facilities in assistance of" the MEA-PAC are, once again, made for the purpose of "the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question," MCL 169.206(1)(a), because, as discussed previously, the purpose of the MEA-PAC is to facilitate and coordinate the involvement of the MEA in politics, by electing candidates favored by the MEA and by enacting MEA legislative and policy initiatives. Thus, the school district's administration of the payroll deduction plan constitutes an "expenditure" as that term is defined by MCL 169.206(1)(a) and is specifically prohibited.

The majority concedes that the school district's administration of the deduction plan "falls within the general definition of 'expenditure' under MCL 169.206(1) . . . ." *Ante* at 30. However, the majority holds that the plan also falls within a specific statutory *exclusion* from the definition of an "expenditure." See *ante* at 30. This exception provides that an "expenditure" does not include "[a]n expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee." MCL 169.206(2)(c). According to the majority, a school district's administration of a payroll deduction plan that remits payments to a political

action committee constitutes an "expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee" and is, therefore, allowed under § 57. *Ante* at 32-33. However, the majority overlooks that a "*public body*," such as a school district, is not authorized to "establish" a separate segregated fund under MCFA and, therefore, may not rely on the § 6(2)(c) exclusion.

Instead, this exclusion is clearly designed to apply only to corporations and labor organizations that possess the authority to create, establish, administer, or fund separate segregated funds in the first place. This interpretation, limiting the § 6(2)(c) exclusion to corporations and labor organizations, is a necessary implication from the structure of MCFA for three reasons. First, § 54 of MCFA, MCL 169.254, imposes the same rule, prohibiting the making of a "contribution or expenditure," on corporations and labor organizations that § 57 imposes on public bodies. In pertinent part, § 54 provides:

> Except with respect to the exceptions and conditions in . . . *section 55* [MCL 169.255]. . . a corporation, joint stock company, domestic dependent sovereign, or labor organization shall not make a contribution or expenditure . . . . [MCL 169.254(1) (emphasis added).]

Second, unlike § 57, § 54 does not constitute an absolute prohibition against making a "contribution or expenditure;" rather, pursuant to § 55,

> [a] corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization formed under the laws of this or another state or foreign country may make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. A separate segregated fund estab-

> lished under this section shall be limited to making contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, political committees, and independent committees. [MCL 169.255(1).]

Third, there is no similar counterpart in § 57 that allows a "public body" to make "an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund . . . ." Thus, under § 55, the *only* entities allowed to establish a separate segregated fund are corporations, joint stock companies, domestic dependent sovereigns, or labor organizations, such as the MEA. Considered together, § 55 and the § 6(2)(c) exclusion that permits an "expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund" provide a limited mechanism allowing entities such as the MEA to create, establish, administer, or fund a separate segregated fund for purposes that would otherwise be disallowed by § 54. In contrast, a "public body," such as a school district, is not entitled to create, establish, administer, or fund a separate segregated fund, under § 55 or any other provision, and thus may not rely on the § 6(2)(c) exclusion from the definition of an "expenditure."

Even if, as the majority claims, the § 6(2)(c) exclusion is not limited to § 55 entities, the majority's application of the exclusion remains utterly illogical. The majority concludes that although a school district's administration of the payroll deduction plan constitutes an "expenditure," it is nevertheless

> explicitly excluded from the statutory definition under MCL 169.206(2)(c) . . . [, which] excludes from the definition of "expenditure" any "expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee." A

> public school's administration of a payroll deduction falls squarely within the statutory exception. The system is set up to facilitate MEA member contributions to their separate segregated fund, the MEA-PAC. Therefore, the administration of the system is not an "expenditure" under the MCFA.
>
> * * *
>
> . . . Most importantly, the Secretary of State's interpretation of "expenditure" is incorrect because it directly conflicts with the relevant statutory language. The Secretary of State's interpretation of "expenditure" includes costs associated with collecting and delivering contributions to a committee. But . . . the statutory definition of "expenditure" explicitly excludes these costs. . . . The plain language of the statute dictates that the administration costs at issue are excluded from the statutory term "expenditure." [*Ante* at 30-32 (emphasis omitted).]

The majority thus concludes that the administration of a payroll deduction plan falls "squarely within the statutory exception." Under MCL 169.206(2)(c), an "expenditure" does not encompass what would otherwise be an "expenditure" for (a) establishment of a separate segregated fund or independent committee, (b) administration of a separate segregated fund or independent committee, or (c) solicitation of contributions to a separate segregated fund or independent committee. Thus, in order to fall within the purview of this exception, a "public body" must be engaged in one of these enumerated activities. In this case, however, the school district is engaged in none.

First, the school district is not making an "expenditure" for the *establishment* of a separate segregated fund or independent committee because the separate segregated fund, the MEA-PAC, has already been established by the MEA. In any event, the school district

could not establish a separate segregated fund in the first place, because that authority is limited to the entities enumerated in § 55 (corporations, joint stock companies, domestic dependent sovereigns, and labor organizations).

Second, the school district is not making an "expenditure" for the *administration* of a separate segregated fund or independent committee because the school district is not "administering" the MEA-PAC; rather, the school district is simply administering the payroll deduction plan that remits funds to the MEA-PAC. That is, the school district makes no determinations at all concerning amounts of funds to be raised from MEA members or other funding sources; the nature and substance of communications to MEA members and other funding sources about the need and urgency of such contributions; the identification of political candidates and causes as beneficiaries of the MEA-PAC, and in what amounts; or strategies for optimizing the impact of MEA-PAC participation in political campaigns and causes. The majority, however, holds that "[t]he plain language of the statute dictates that the administration costs at issue are excluded from the statutory term 'expenditure.' " *Ante* at 32. In so asserting, the majority misinterprets the statute, because the only administrative costs that are excluded under this exclusion are those associated with administering a "separate segregated fund or independent committee." MCL 169.206(2)(c). That the school district is administering a *process* by which payments are *remitted* to such a fund is hardly the equivalent of administering the fund itself, such that the § 6(2)(c) exclusion would apply. The majority is badly confused in this regard.

Third, the school district is not making an "expenditure" for the *solicitation of contributions* to a separate

segregated fund or independent committee; rather, the school district is using public resources for processing payments to the MEA-PAC. As discussed earlier, the school district's "expenditure" consists of the use of personnel, office space, computers, software, and other public resources to remit payments to the MEA-PAC. The school district is not, for example, maintaining an advertising campaign on behalf of the MEA-PAC, cold-calling MEA members, or preparing mailers or brochures to enlist contributors. As such, the school district's use of public resources for processing payments to the MEA-PAC cannot be viewed as *soliciting* contributions, but only as facilitating such contributions, an entirely distinct concept. It follows that because the school district's administration of the payroll deduction plan does not fall within any of the three enumerated exclusions set forth in MCL 169.206(2)(c), it is not excluded from the definition of an "expenditure."[9]

C. RELEVANCE OF ADVANCE PAYMENTS

Having determined that the school district's administration of the payroll deduction plan that remits payments to the MEA-PAC constitutes both a "contribution" and an "expenditure," the question remains whether the MEA's preparedness to pay in advance the school district's costs associated with the plan remedies what would otherwise constitute a violation of § 57. I do not believe that it does.

---

[9] Even assuming arguendo that the school district's administration of the payroll deduction plan constitutes "an expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee," which we believe it plainly does not, by its terms, the exclusion only applies to "expenditure," and not to "contribution."

The Court of Appeals, in my judgment, correctly held that there is "nothing in the plain language of the MCFA that indicates reimbursement negates something that otherwise constitutes an expenditure." *Mich Ed Ass'n*, 280 Mich App at 486. A court's primary purpose in interpreting a statute is to ascertain and effectuate legislative intent. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). "Courts may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) (citations omitted). The Legislature declined to provide that advance payments remedy what would otherwise constitute a violation of § 57.

The suggestion that advance payments remedy a violation of § 57 is belied by the terms of the statute. Section 57 provides that "[a] public body . . . *shall not use or authorize the use*" of public resources to make a "contribution or expenditure . . . ." MCL 169.257(1) (emphasis added). The use of "shall" in a statute generally "indicates a mandatory and imperative directive." *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005) (citations omitted). As such, the statute mandates that the school district not "use or authorize the use of" its public resources to make a "contribution" or an "expenditure." Nothing in MCFA leads to the conclusion that the Legislature intended § 57 to be interpreted any differently. Irrespective of whether the school district is reimbursed for its administration of the payroll deduction plan, the school district nonetheless has employed public resources to make a "contribution or expenditure" for political pur-

poses.[10] The advance payment of expenses simply does not negate what § 57 is intended to prohibit. That is, the gravamen of § 57 is not that a "public body," whose resources have been employed for private political purposes be compensated on a dollar-for-dollar basis, but that public resources not be used for such purposes in the first place. That the costs of dismantling the wall separating government and partisan political campaigning are to be paid by those who desire to use taxpayer resources for their own campaigning is not the point of § 57; rather, it is that the wall not be dismantled.[11]

Furthermore, the unquantifiable cost to the school district, as well as to taxpayers, parents, and students, of having time and resources diverted from the school district's primary responsibilities of administering schools and educating students in order to administer a process of raising political contributions for the MEA-PAC cannot simply be paid in advance or reimbursed. Time is a zero-sum resource, and it is irretrievably lost to taxpayers, parents, and students when it is taken away from the former responsibilities and redirected to the latter responsibilities. If some lesser portion of each

---

[10] Moreover, the advance payment of the school district's *expenses* in administering the deduction plan does not avoid the question of the *extent* to which an exchange of something of "ascertainable monetary value" has taken place. Where the school district has provided a service "at cost" to the MEA-PAC, even though the "ascertainable monetary *value*" of that service to the MEA-PAC exceeds that cost, as it almost always will in an economy in which service providers typically seek to profit from their services, further inquiry would be necessary concerning the specific terms of the school district-political action committee transaction, even if such a transaction were permissible in the first place under § 57.

[11] If the MEA-PAC is allowed to commandeer the resources of a "public body" simply by reimbursing its costs, there is nothing that would prevent the political action committee of any corporation from demanding or receiving the same treatment.

day is devoted to the interests of the school district and a greater portion of each day is devoted to the partisan political interests of a labor organization, taxpayers, parents, and students suffer. Although advance payment may recompense the school district its employees' salaries for the time spent on administration of the plan and for the use of supplies and other public resources, monetary reimbursement, paid in advance or otherwise, is simply insufficient to recover the time that is diverted from the primary obligations of the school district.

Moreover, because neither advance payments nor reimbursements prevent the prohibited "use" of public resources from occurring in the first place, the act is punishable as a misdemeanor and subject to a fine that may be "equal to the amount of the improper contribution or expenditure." MCL 169.257(2)(b). The fact that one of the penalties for making an improper "contribution or expenditure" requires the violator to pay an amount that is "equal to the amount of the improper contribution or expenditure" indicates strongly that such a payment, whether in the form of a "penalty" or a "reimbursement," does not transform an improper "contribution or expenditure" into a proper one. Had the Legislature intended otherwise, the misdemeanor statute would more likely have read that the criminal sanction to be paid is "equal to the amount of the improper contribution or expenditure, *less any reimbursement of such contribution or expenditure*."[12]

[12] The MEA also argues with regard to reimbursements that since the school district is reimbursed all costs and expenses, its administration of the deduction plan does not amount to a "contribution or expenditure" because a "contribution" does not encompass "[a]n offer or tender of a contribution if expressly and unconditionally rejected, returned, or refunded in whole or in part within 30 business days after receipt," MCL 169.204(3)(c), and an "expenditure" does not include "[a]n offer or tender

V. RESPONSE TO MAJORITY

As discussed previously, I believe that the majority errs by holding that a school district's administration of the payroll deduction plan is excluded from the definition of an "expenditure" under MCL 169.206(2)(c) because a "public body," such as a school district, is not authorized to create a separate segregated fund under MCFA and, therefore, may not rely on the § 6(2)(c) exclusion from the definition of an "expenditure." Even if a "public body" is entitled to rely on this exclusion, the majority errs by holding that the school district's administration of the payroll deduction plan falls "within the statutory exception" because the "expenditure" cannot be characterized as "[a]n expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee." As also discussed, I believe that the majority errs by holding that a school district's admin-

---

of an expenditure if expressly and unconditionally rejected or returned," MCL 169.206(2)(e). However, this argument clearly lacks merit because the MEA-PAC's offer to *reimburse expenses* can hardly be said to constitute a "rejection, return, or refund" of a "contribution" or an "expenditure." When the school district collects and remits payments from MEA members to the MEA-PAC, it makes an "offer or tender" of a "contribution or expenditure." To qualify for the "offer or tender" exception, the MEA-PAC would have to unconditionally "reject or return" the services of the school district, something which it neither does nor has any intention of doing. Because the school district's services are unconditionally accepted by the MEA-PAC, the school district's administration of the payroll deduction plan is not excluded from the definition of a "contribution" or an "expenditure" under either section of MCFA. Finally, the obvious should be observed, to wit, although the Legislature excluded from the definitions of "contribution" and "expenditure" "an offer or tender" of a "contribution or expenditure" that has been rejected, returned, or refunded, there is no similar exclusion for "reimbursements," an exclusion that should be thought to have been obvious, if intended. The majority nonetheless intuits from the "reject or return" exception that "contribution" in MCL 169.204(1) "clearly requires . . . a net transfer of value." *Ante* at 37.

istration of the payroll deduction plan does not constitute a "contribution." This latter aspect of the majority's opinion warrants brief further discussion.

(a) In circular fashion, the majority holds that the definition of "contribution" encompasses the term "expenditure" and, thus, because the school district's administration of the payroll deduction plan does not constitute an "expenditure," it also cannot be a "contribution." The majority then states that "[t]he only other way that the administration of the system could be a 'contribution' under the MCFA would be if administering the system resulted in a 'transfer of anything of ascertainable monetary value . . . .' " *Ante* at 34. This assertion is erroneous. As discussed earlier, an "in-kind contribution," which is a "contribution . . . other than money," also constitutes a "contribution." MCL 169.209(3). Similarly, MCFA defines as a "contribution" a "payment." MCL 169.204(1). The school district arguably makes a "payment" to the MEA-PAC when it transfers money from participating MEA members to the MEA-PAC. Although in these circumstances the school district only acts as a conduit, a "contribution" made at the direction of another person "shall be regarded as an expenditure or contribution attributable to both persons . . . ." MCL 169.270.

(b) The majority further errs by concluding that its interpretation is necessary to avoid absurd results. In discussing whether the administration of the payroll deduction plan constitutes a "transfer of anything of ascertainable monetary value" and thus a "contribution," the majority states:

> There are two competing ways in which to interpret the word "transfer" in the statute. The first way to read the statute would require that any conveyance of value for services provided to a campaign, regardless of whether the

> services are paid for, would constitute a contribution. The second way to read the statute would require a net conveyance of value in order to be a "transfer of anything of ascertainable monetary value."
>
> We conclude that the statute must be read to require a net conveyance of monetary value, as opposed to a mere exchange of value. Any other interpretation of "contribution" would lead to an absurd result, and statutes must be construed to prevent absurd results. For example, if the statute were to be interpreted in the manner the Secretary of State suggests, then a print shop that sells signage to a campaign in the normal course of business would be making a contribution to the campaign because it has transferred something of monetary value to the campaign, even though the shop has been compensated for the cost of providing the signage. Such an interpretation of "contribution" would defy common sense, and we do not read the statute in this manner. [*Ante* at 35-36 (citations omitted).]

By emphasizing that its interpretation is necessary to avoid "absurd results," the majority itself appears to concede that the more natural interpretation of the law is that asserted by this dissent. Resort to "absurd results" analysis is generally necessary only to avoid an interpretation that would otherwise flow from a statute by the application of traditional principles of interpretation.

In essence, the majority believes that it is necessary to read MCL 169.204(1) as if it referred to a "*net* transfer of anything of ascertainable monetary value," which it does not, in order to avoid the allegedly "absurd result" to which our interpretation of MCL 169.204(1) would lead. What is this allegedly "absurd result"? What is this result that is "quite impossible that [the Legislature] could have intended"? *Pub Citizen v United States Dep't of Justice*, 491 US 440, 471; 109 S Ct 2558; 105 L Ed 2d 377 (1989) (Kennedy, J., concurring). What is this result that is "unthinkable" or

"bizarre"? *Green v Bock Laundry Machine Co*, 490 US 504, 527; 109 S Ct 1981; 104 L Ed 2d 557 (1989) (Scalia, J., concurring). What is this result that "cannot rationally . . . mean" what it seems to mean? *Id*. at 528.[13] That there be no exchanges of value between a "public body" and a partisan political action committee? That the government not further the partisan interests of a political action committee? That taxpayer resources not be employed to collect, and facilitate, partisan political contributions? While these results may be "absurd" to the majority justices, we do not find these to be "absurd" at all. Once again, the majority seems to equate an "absurd result" with a disagreeable result. *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 84-86; 718 NW2d 784 (2006) (MARKMAN, J., concurring); *Petersen v Magna Corp*, 484 Mich 300, 370; 773 NW2d 564 (2009) (MARKMAN, J., dissenting). Furthermore, the specific "absurd result" alleged here by the majority, that a print shop could not sell signs to a campaign because this would constitute a "contribution," is itself absurd. A print shop is not a "public body" and, therefore, unlike a school district, is not regulated by § 57 of MCFA.

(c) The majority also errs when it concludes that MCL 408.477 of the wages and fringe benefits act provides authority for the school district to administer the payroll deduction plan. "[S]chool districts and school officers have only such powers as the statutes expressly or impliedly grant to them." *Jacox v Van Buren Consol Sch Dist Bd of Ed*, 293 Mich 126, 128; 291 NW 247 (1940). " 'The extent of the authority of the people's public agents is measured by the statute from

[13] Although I continue to abide by an "absurd results" rule—albeit a vastly different "absurd results" rule than the majority justices—the two justices who join this dissent do not. See *People v McIntire*, 461 Mich 147, 152-160; 599 NW2d 102 (1999); cf. *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 78-80, 84-86; 718 NW2d 784 (2006) (MARKMAN, J., concurring).

which they derive their authority, not by their own acts and assumption of authority.' " *Sittler v Mich College of Mining & Tech Bd of Control*, 333 Mich 681, 687; 53 NW2d 681 (1952) (citation omitted). Contrary to the belief of the majority, the authority to administer a payroll deduction plan for a political action committee is not expressly or impliedly granted to schools in any statute.

While MCL 408.477 of the wages and fringe benefits act refers to payroll deductions, it does not authorize school districts to administer payroll deductions *for political action committees*. MCL 408.477(1) provides in full:

> Except for those deductions required or expressly permitted by law or by a collective bargaining agreement, an employer shall not deduct from the wages of an employee, directly or indirectly, any amount including an employee contribution to a separate segregated fund established by a corporation or labor organization under section 55 of the Michigan campaign finance act, Act No. 388 of the Public Acts of 1976, being section 169.255 of the Michigan Compiled Laws, without the full, free, and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction.[14]

From this statute, the majority summarily concludes that, "under the plain language of MCL 408.477, public bodies have the authority to administer a payroll deduction plan that contributes money to the MEA-PAC if the MEA enters into a collective bargaining agreement that expressly permits the deductions." *Ante* at 38 n 29. Once again, the majority has grossly misinterpreted a statute. MCL 408.477 has absolutely nothing to do with whether a "public body" may administer a payroll deduction plan for the benefit of the MEA-PAC. Rather,

[14] See also MCL 169.255(6).

the statute describes the approval required for an employer to deduct a portion of an employee's wages and states that in order to deduct wages from an employee, an employer must obtain the employee's voluntary consent. The statute also provides that such consent is not required when the wage deduction is expressly permitted by law or by a collective bargaining agreement. The most that can be discerned from this statute as it pertains to the instant case is that, if the school district is to deduct wages from its employees, it must obtain the employees' voluntary consent unless the deduction is expressly permitted by law or a collective bargaining agreement. However, neither MCL 408.477 nor any other statute provides *authority* for a "public body" to administer a payroll deduction plan that contributes money to a *political action committee*. Therefore, even if the school district's administration of a payroll deduction plan did not constitute a "contribution" or an "expenditure," which it clearly does, in my judgment, the school district still lacks the *authority* to administer such a plan because no statute accords the school district this authority, and the school district only has the authority accorded to it by statute. Indeed, as explained earlier, the Legislature has affirmatively and expressly forbidden a school district, or any other public body, from making a "contribution or expenditure" to a political action committee.

VI. TREATMENT OF THIS CASE

Particularly striking in its resolution of this case has been the majority's unprecedentedly *dilatory* treatment, followed abruptly by its unprecedentedly *accelerated* treatment. The Court of Appeals issued its decision on August 28, 2008; this Court entered an order scheduling oral argument on the application for leave to

appeal more than eight months later on May 8, 2009; oral arguments were heard six months later on November 5, 2009; and leave to appeal was granted seven months later on June 4, 2010. When leave to appeal was granted, the majority justified this on the grounds that the Court needed to be informed about the impact of *Citizens United v Fed Election Comm*, 558 US ___; 130 S Ct 876; 175 L Ed 2d 753 (2010), a then-recent United States Supreme Court decision. *Mich Ed Ass'n v Secretary of State*, 486 Mich 952 (2010). The three dissenting justices in the instant case, who also dissented from the earlier grant of leave, described the complete lack of relevance of *Citizens*, asserting in pertinent part:

> Unlike *Citizens United*, the issues in this case have nothing to do with corporate free speech, nothing to do with labor union free speech, nothing to do with the Federal Election Campaign Act, nothing to do with Federal Election Commission rules or regulations, and indeed nothing to do with campaign speech or the First Amendment. In short, it has nothing to do with anything involved in *Citizens United*. Instead, it involves only whether § 57 of the Michigan Campaign Finance Act bars a school district from administering a payroll deduction plan for a political action committee.
>
> Indeed, neither party itself has suggested that this case is affected in any way by *Citizens United*, nor sought any opportunity to file a supplemental brief. Yet suddenly it is necessary that this Court delay resolution of this case for what will be a minimum of seven or eight additional months, on top of the six or seven months that have already passed since oral argument. I am aware of no previous instance in which this Court has held arguments on an application, taken no action in response to such arguments for more than six months, and then granted leave to appeal late during that term, ensuring that such case will not be further considered during that term and that a decision will not be forthcoming until, at the earliest, the beginning of the second calendar year, 2011, after arguments were initially heard. This, with

regard to a case that may affect the administrative processes of every school district across this state.

This Court has been presented with substantial briefs from each party. Each party has filed an original and supplemental brief, four amicus briefs have been filed, and oral argument has taken place that lasted well beyond the normal time allotted for such argument. We have heard from the Secretary of State, the Attorney General, the Michigan AFL-CIO, the Chamber of Commerce, the Michigan State Employee's Association, and the Mackinac Center, with a supplemental brief filed by the AFL-CIO and two supplemental briefs filed by the Chamber of Commerce. This case involves a straightforward matter of *statutory* interpretation, and no justice has identified to any of the parties at oral argument, or at any later juncture, any aspect of this case that has not been thoroughly addressed.

To grant leave to appeal under these circumstances constitutes an utter waste of judicial resources, imposes an altogether unnecessary expense upon the parties, and unconscionably delays resolution of an important dispute of statewide importance for no proper reason. What accounts for, and justifies, this delay? What is taking place here is an abuse of the judicial process, and the majority owes considerably more explanation for its actions than it has given. [*Id.* at 953 (MARKMAN, J., dissenting).]

The majority now summarily states in is opinion:

> We note that because the issues presented in this case can be resolved under Michigan law, we do not opine on the application of United States Supreme Court caselaw. [*Ante* at 26 n 8.][15]

The absence of any conceivable relevance of *Citizens United* underscores our concern that the grant of leave to appeal in this case, following the argument on the appli-

[15] Of course, whether "the issues presented in this case can be resolved under Michigan law" is irrelevant to whether United States Supreme Court caselaw interpreting the United States Constitution applies in any given case.

cation, represented a waste of judicial resources that imposed unnecessary expenses on the parties, while delaying resolution of an important dispute of statewide importance. Indeed, even before we heard oral arguments on the application, the United States Supreme Court specifically upheld Idaho's absolute ban on the administration of payroll deduction plans by public bodies to facilitate employee contributions to political action committees. *Ysursa v Pocatello Ed Ass'n*, 555 US 353; 129 S Ct 1093; 172 L Ed 2d 770 (2009).

MCR 7.302(G)(1), which is now MCR 7.302(H)(1), was amended in 2003 to allow us discretion to order oral argument before deciding whether to grant leave to appeal. This rule created

> an alternative procedure in those cases in which a majority of the Court believes that an error or an injustice will result from a lower court decision, yet in which there is not a sufficiently far-reaching or difficult legal issue to warrant using the Court's limited resources for full oral argument. [See MCR 7.302, 469 Mich cxlvi (MARKMAN, J., concurring).]

Since the inception of this rule, we have directed the clerk of the Court to schedule arguments on whether to grant applications for leave in 280 cases. Of those cases, only 14, including the instant case, resulted in a grant of the application. Of these 14 cases, none involved a delay between argument on the application and the grant of leave approaching that involved in this case. Arguments here, which had already been delayed by more than eight months on the application, were followed by an additional seven-month delay before the application was even granted. Of the other 13 cases that followed the same double-hearing procedure, not a single one took seven months between the time of arguments on the application and the grant of leave; indeed, in a majority of those cases, the time elapsed was less than one month.

After granting leave to appeal, this Court again heard oral arguments in November of this year, the period for dissenting justices to respond to the majority opinion was then compressed, and the majority has now, in December, issued an opinion in what approaches, if not exceeds, record time for the issuance of a major opinion of this Court. The majority owes the parties and the public an explanation for their treatment of a case whose resolution is so critical to maintaining the integrity of the governmental processes of our state.

VII. CONCLUSION

Section 57 prohibits a "public body" from using public resources to make a "contribution or expenditure" for political purposes. The school district's administration of the payroll deduction plan in this case, remitting payments to the MEA-PAC, constitutes both a "contribution" and an "expenditure" as defined by MCFA. The MEA-PAC's offer to reimburse the school district for expenses incurred in its administration of the plan does not remedy an otherwise clear violation of § 57. The majority's contrary interpretation undermines the objectives of the Legislature, which enacted § 57 to mandate the separation of the government from politics in order to maintain governmental neutrality in elections, preserve fair democratic processes, and prevent taxpayer funds from being used to subsidize partisan political activities. The payroll deduction plan in this case is inconsistent with this legislative purpose and inconsistent with the language of the law. Accordingly, I would affirm the judgment of the Court of Appeals.

CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

ANGLERS OF THE AuSABLE, INC
v DEPARTMENT OF ENVIRONMENTAL QUALITY

Docket Nos. 138863 to 138866. Argued October 6, 2010 (Calendar No. 5). Decided December 29, 2010. Vacated and appeal dismissed on rehearing, 489 Mich 884.

Anglers of the AuSable, Inc., Mayer Family Investment, L.L.C. (Mayer), and the Nancy A. Forcier Trust (Forcier) brought an action in the Otsego Circuit Court against the Department of Environmental Quality and its director (collectively the DEQ) and Merit Energy Company, alleging, in part, common-law water-rights violations and statutory violations of the Natural Resources and Environmental Protection Act (NREPA), including the Michigan environmental protection act (MEPA), MCL 324.1701 *et seq*., which is a part of NREPA. The alleged violations concerned a corrective action plan approved by the DEQ that called for pumping contaminated groundwater that originated from Merit's nonriparian property to a treating station on the property, then through a pipeline constructed, in part, over state land to a wetland owned by the Department of Natural Resources (DNR), from which Kolke Creek originates and flows into Lynn Lake and eventually into the AuSable River. Plaintiffs Mayer and Forcier are riparian owners of land abutting the creek, lake, or river and are members of Anglers of the AuSable, which uses the water resources for recreational purposes. Plaintiffs claimed that the proposed discharge of the treated water would harm the water quality and impair their use of the water. The court, Dennis F. Murphy, J., issued an opinion and order enjoining Merit from discharging any treated water into the Kolke Creek system. The court specifically found that the proposed discharge would constitute an unreasonable use of riparian rights, which the DNR's easement for the pipeline had failed to convey to Merit, and a violation of MEPA. Plaintiffs moved for clarification and modification of the order, and the court entered an order indicating that no bar exists for the artificial use of a watercourse for the benefit of a parcel outside a watershed, that the DNR may convey riparian rights by easement to Merit, that the proposed discharge was unreasonable, and that the prior order of the court was the final order in this case. The court then awarded plaintiffs fees and costs. The DEQ, Anglers of the AuSable, and Mayer appealed separately, and the appeals were

consolidated. The Court of Appeals, MURRAY, P.J., and MARKEY and WILDER, JJ., reversed the opinion and order of the trial court insofar as it held that the easement had failed to convey riparian rights to Merit and that the DEQ should not be dismissed from the case under *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508 (2004) (which held that an improper administrative decision does not constitute a MEPA violation). The Court also reversed the order awarding costs and fees. The Court affirmed the trial court's decision regarding the reasonableness of Merit's proposed discharge plan. 283 Mich App 115 (2009). The Supreme Court granted plaintiffs' application for leave to appeal. 485 Mich 1067 (2010).

In an opinion by Justice DAVIS, joined by Justice HATHAWAY, and an opinion by Chief Justice KELLY, joined by Justice CAVANAGH, the Supreme Court *held*:

1. The DEQ may be sustained as a defendant in a MEPA action when it is alleged to have authorized activity that will harm the environment. *Preserve the Dunes* is overruled.

2. Merit's discharge plan is not an allowable use of water because it is manifestly unreasonable.

Affirmed in part, reversed in part, and remanded to the trial court.

Justice DAVIS, joined by Justice HATHAWAY, further stated in the lead opinion that the prior overruling of *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280 (2007), by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010), did not affect the "reasonable use balancing test" employed by the Court of Appeals in that case; that an unreasonable use of water has never been deemed, and is not now, an allowable use; that defendants presented no authority for the proposition that the diversion of contaminated water from one source to an uncontaminated watershed should be considered reasonable; that it would be incongruous to hold that it is reasonable to decontaminate water by contaminating different water; and that it would be unconscionable and destructive for the Supreme Court to determine that it is reasonable to spread dangerous contamination throughout the state.

Chief Justice KELLY, joined by Justice CAVANAGH, concurred in parts I, II, III(A), III(B), and IV of the lead opinion and concurred in result only with respect to part III(C). She wrote separately to articulate her preferred approach to stare decisis, which is to begin with a presumption that upholding precedent is the preferred course of action. This presumption may be rebutted if the consideration of the applicable evaluative criteria leads to the conclusion that a compelling justification exists for overturning the precedent. When a precedent itself represents a departure from established caselaw, a

decreased presumption applies. After considering the applicable criteria, she concluded that a compelling justification exists for overruling *Preserve the Dunes* because it usurped the Legislature's grant of a cause of action for environmental harm, caused serious detriment prejudicial to public interests, and represented an abrupt and largely unexplained departure from precedent.

Justice YOUNG, joined by Justices CORRIGAN and MARKMAN, dissenting, stated that the Supreme Court lacked the constitutional authority to decide the appeal because it did not present a live controversy and was therefore moot. He further stated that the lead opinion's creation of a new rule that certain discharges of contaminants are per se unreasonable infringements on riparian owners' rights constituted a sharp divergence from Michigan's established common law, which ties the reasonableness of a discharge to the existence of a private nuisance or impairment of riparian rights. He also stated that *Preserve the Dunes* correctly held that the mere issuance of a permit is not itself conduct that can violate MEPA and should not be overruled.

ENVIRONMENT — ENVIRONMENTAL PROTECTION ACT — ADMINISTRATIVE LAW — ACTIONS.

An administrative decision to authorize activity that will allegedly harm the environment may form the basis for an action against the agency under the Michigan Environmental Protection Act (MCL 324.1701 *et seq*.).

Olson, Bzdok & Howard, P.C. (by *James M. Olson*, *Jeffrey L. Jocks*, and *Thomas A. Baird*), for Anglers of the AuSable, Inc.

Topp Law Office (by *Susan Hlywa Topp*) for Mayer Family Investments and Nancy A. Forcier Trust.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *S. Peter Manning*, *Neil D. Gordon*, and *Darryl J. Paquette*, Assistant Attorneys General, for the Department of Natural Resources and Environment.

Foster, Swift, Collins & Smith, P.C. (by *Charles E. Barbieri* and *Zachary W. Behler*), for Merit Energy Company.

Amici Curiae:

Dawda, Mann, Mulcahy & Sadler, PLC (by *Brian J. Considine*), for the Michigan Council of Trout Unlimited.

Neal, Gerber & Eisenberg LLP (by *Phil C. Neal* and *Dao L. Boyle*) for Preserve the Dunes, Inc.

Michael H. Dettmer for Michigan Citizens for Water Conservation.

Clark Hill PLC (by *David D. Grande-Cassell* and *Kristin B. Bellar*) for the Michigan Manufacturers Association.

Beier Howlett, P.C. (by *Jeffrey K. Haynes* and *Keith C. Jablonski*), for the Michigan Environmental Council.

Nicholas J. Schroeck and *Sara R. Gosman* for the National Wildlife Federation and the Great Lakes Environmental Law Center.

DAVIS, J. In this case we determine whether defendant Merit Energy Company's plan to discharge contaminated water from an environmental cleanup site in the Manistee River watershed into a previously unpolluted site in the AuSable River watershed is an allowable use of water. We also determine in this case whether the Michigan Department of Environmental Quality (DEQ) (which is now the Department of Natural Resources and Environment) can be sustained as a defendant in an action brought under the Michigan environmental protection act (MEPA), MCL 324.1701 *et seq*., when the DEQ is alleged to have authorized activity that will harm the environment.

We hold that Merit's discharge plan is not an allowable use of water because it is manifestly unreasonable, and we further hold that the DEQ can be sustained as a defendant

in a MEPA action when the DEQ has issued a permit for activity that it is alleged will cause environmental harm. Accordingly, we reverse the Court of Appeals' judgment in part and remand the case for reinstatement of the trial court's decision holding the DEQ accountable for violating MEPA.

I. FACTS AND PROCEDURAL HISTORY

This case arises out of Merit's proposed plan to discharge treated, but still partially contaminated, water from the Manistee River watershed into the AuSable River water system in an effort to clean a plume of contaminated groundwater.

In 2004, Merit acquired the Hayes 22 Central Production Facility (CPF) located in Otsego County, Michigan. As a condition to purchasing the CPF, Merit entered into a settlement agreement with the DEQ to remediate the plume of contaminated groundwater that had originated from the CPF.

The exact size of the plume, which at the time was continuing to expand, is unknown. The plume contains benzene, toluene, ethylbenzene, and xylenes and chlorides contained in brine, among other contaminants. The plume is known to have contaminated several residential drinking wells and may have contaminated other residential wells as it continued to expand.

Merit evaluated a number of options for remediation and ultimately chose air stripping—a process that forces a stream of air through water, causing hydrocarbons to evaporate.[1] Merit submitted a corrective action plan to the DEQ to remediate 1.15 million gallons of plume water a day through the use of air stripping.

[1] The air-stripping process does not remove any brines or chlorides from the water. Thus, although the water is cleaner at discharge than when it was first removed from the ground at the CPF, the water remains contaminated in some respects.

The plan was to send the 1.15 million gallons a day through a 1.3-mile pipeline from the air-stripping site to be discharged into Kolke Creek. Kolke Creek forms the headwater system for the AuSable River watershed. Kolke Creek feeds into Bradford Creek, Lynn Lake, and the AuSable River.[2]

The DEQ approved Merit's corrective action plan and issued a general permit and certificate of coverage allowing discharge of treated water from the air stripper into the wetland area flowing into Kolke Creek. The DEQ also granted Merit an easement through state-owned land to allow Merit to construct the pipeline from the air stripper to the discharge point.

Plaintiffs filed a complaint against Merit and the DEQ in the Otsego County Circuit Court. Plaintiffs alleged violations of surface-water law, riparian law, and MEPA. Plaintiffs sought an injunction against the discharge plan.

After a bench trial on plaintiffs' complaint, the trial court issued an opinion and injunction preventing Merit from discharging the air-stripped water into Kolke Creek. The court made detailed findings of fact and concluded that the proposed discharge plan would severely harm the AuSable River water system because of the increased flow of water and the increased level of substances not previously found in Kolke Creek.[3] It applied the "reasonable use balancing test" from *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25; 709 NW2d 174 (2005).

---

[2] The plaintiffs in this case are either riparian owners along these waterways or users of the waterways for recreational purposes such as fishing. The waterways are considered prime trout-fishing locations because of their purity and mineral content.

[3] The trial court also made findings about whether Merit had properly obtained rights to discharge the treated water through the state-land easement. However, because we do not find those issues to be outcome-determinative in this appeal, we will not address them in this opinion.

In applying the reasonable-use balancing test from *Nestlé*, the trial court concluded that Merit's proposed amount of discharge constituted an unreasonable use. The court ruled that the proposed discharge, and the DEQ's authorization of the discharge, violated MEPA. However, in its injunction preventing the discharge, the court left open the possibility that Merit could discharge treated water into Kolke Creek at a lower rate that might be considered reasonable under the reasonable-use balancing test.[4]

All parties appealed in the Court of Appeals. In a unanimous opinion, the Court of Appeals affirmed the trial court's decision regarding the reasonableness of Merit's proposed discharge plan. *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 283 Mich App 115; 770 NW2d 359 (2009). The Court applied the reasonable-use balancing test and noted that the trial court had left open the possibility that Merit could discharge treated water at a lower, more reasonable rate. *Id*. at 136-137. The Court of Appeals also unanimously dismissed the DEQ as a defendant, applying this Court's precedent from *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004).

Plaintiffs sought leave to appeal in this Court. We granted leave to appeal, asking the parties to discuss, among other issues, whether *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479

[4] Merit contends that this case is now moot because it has abandoned the Kolke Creek discharge plan and is instead treating the CPF contamination plume through another method. However, as correctly argued by the plaintiffs, the trial court has left open the door for Merit to discharge treated water into Kolke Creek at a lower than originally proposed rate. Because there is still a court order keeping the Kolke Creek discharge plan alive, we cannot treat this case as moot.

Mich 280; 737 NW2d 447 (2007), and *Preserve the Dunes* were correctly decided.[5]

II. STANDARD OF REVIEW

We review a trial court's factual findings for clear error and its legal conclusions de novo. *Hendee v Putnam Twp*, 486 Mich 556, 566; 786 NW2d 521 (2010). Whether this Court's decision in a previous case should be overruled is a question of law that this Court reviews de novo. *Bush v Shabahang*, 484 Mich 156, 164; 772 NW2d 272 (2009).

III. ANALYSIS

A. *PRESERVE THE DUNES v DEP'T OF ENVIRONMENTAL QUALITY*

In our order granting leave to appeal, we asked the parties to address whether this Court's opinion in *Preserve the Dunes* was correctly decided. After further review of the *Preserve the Dunes* decision, we conclude that it was decided incorrectly and, accordingly, we overrule it.

Preserve the Dunes involved a group of citizens suing the DEQ for authorizing a permit for a sand dune mining operation[6] in violation of the sand dune mining act (SDMA). MCL 324.63701 *et seq*. The dune that was to be mined had previously been designated as a protected dune that could not be mined unless one of two exceptions contained in the SDMA applied. The two exceptions were not applicable in that case; therefore, the DEQ's permit allowing the mining operation on the protected dune violated the law.

---

[5] *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 485 Mich 1067 (2010).

[6] The mining operation was also sued, but the focus relevant to this case is the suit against the DEQ.

The concerned citizens in that case filed a lawsuit against the DEQ under MEPA to protect "the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." MCL 324.1701(1). The majority in *Preserve the Dunes* held that reviewing the DEQ's permit decisions was outside the judicial authority under MEPA. *Preserve the Dunes*, 471 Mich at 519. The majority noted that MEPA provides for a private cause of action regarding damage to the environment. *Id*. at 516. The majority stated that the DEQ's permit application review was based on technical aspects of the application process, and not damage to the environment itself. *Id*. at 519. The Court concluded that even if violation of the technical aspects of the application process resulted in environmental damage, that level of causation was not grounds for a private cause of action. The Court stated that the permit process was "unrelated" to any subsequent environmental harm caused by the permitted action. *Id*.

The *Preserve the Dunes* dissent correctly concluded that the majority's holding "that permit eligibility is unrelated to whether the conduct permitted will harm the environment is untenable."[7] Without a permit from the DEQ, a party such as the mining operator in *Preserve the Dunes* or Merit in the instant case lacks the authority to commence the conduct that will harm the environment. The permit from the DEQ serves as the trigger for the environmental harm to occur. The permit process is entirely related to the environmental harm that flows from an improvidently granted, or unlawful, permit.

Before a majority of this Court decided *Preserve the Dunes*, this Court had previously decided other cases in

[7] *Id*. at 533-534 (KELLY, J., dissenting).

which a permit application had been the subject of a MEPA action. Until *Preserve the Dunes*, this Court had never ruled that a permit decision was insulated from a MEPA action.[8] The majority's decision in *Preserve the Dunes* frustrated the legislative intent behind MEPA, and it represented a departure from this Court's precedent. As the *Preserve the Dunes* dissent noted:

> MEPA is intended to prevent conduct that is likely to harm the environment as well as to stop conduct that is presently harming it. In *WMEAC* [*West Mich Environmental Action Council v Natural Resources Comm*, 405 Mich 741; 275 NW2d 538 (1979)], this Court ordered that a permanent injunction be entered prohibiting the drilling of oil and gas wells pursuant to a DNR permit. The "issuance of permits was properly before the circuit court as conduct alleged to be likely to pollute, impair, or destroy" natural resources under MEPA. *WMEAC* at 751. The drilling would cause "apparently serious and lasting, though unquantifiable, damage" to elk herd population. *WMEAC* at 760. This Court concluded that the previous MEPA, MCL 691.1203(1), is violated whenever the effects of permit issuance harm the environment to the requisite degree. *WMEAC* at 751, 760. [*Preserve the Dunes*, 471 Mich at 534 (KELLY, J., dissenting).]

Because the *Preserve the Dunes* opinion violated the legislative intent behind MEPA, and because the opinion conflicted with this Court's caselaw that came before it, we hold that *Preserve the Dunes* was incorrectly decided to the extent that it insulated the DEQ's permit application process from review under MEPA.

There are further compelling justifications for overruling *Preserve the Dunes*. The first is that MEPA is a

---

[8] See, e.g., *Eyde v Michigan*, 393 Mich 453, 454; 225 NW2d 1 (1975), *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 304-305; 224 NW2d 883 (1975), *West Mich Environmental Action Council v Natural Resources Comm*, 405 Mich 741, 751; 275 NW2d 538 (1979), and *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16; 576 NW2d 641 (1998).

statute that was enacted as part of the environmental protection mandate to the Legislature contained in Article 4, § 52 of Michigan's Constitution. In *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 304-306; 224 NW2d 883 (1975), this Court stated:

> Michigan's Environmental Protection Act marks the Legislature's response to our constitutional commitment to the "conservation and development of the natural resources of the state . . ." Const 1963, art 4, § 52 in its entirety reads:
>
> "Section 52. The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. *The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.*" (Emphasis added.)
>
> Michigan's EPA was the first legislation of its kind and has attracted worldwide attention. The act also has served as a model for other states in formulating environmental legislation. The enactment of the EPA signals a dramatic change from the practice where the important task of environmental law enforcement was left to administrative agencies without the opportunity for participation by individuals or groups of citizens. Not every public agency proved to be diligent and dedicated defenders of the environment. The EPA has provided a sizable share of the initiative for environmental law enforcement for that segment of society most directly affected—the public.
>
> The act provides private individuals and other legal entities with standing to maintain actions in the circuit courts for declaratory and other equitable relief against anyone "for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction". MCLA 691.1202(1); MSA 14.528(202)(1).

* * *

> But the EPA does more than give standing to the public and grant equitable powers to the circuit courts, *it also imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities*. [Emphasis added and citations omitted.]

The majority's decision in *Preserve the Dunes* not only violated the Legislature's intent to protect the environment encapsulated in MEPA, it subverted the people's will as expressed in Michigan's constitutional requirement that the Legislature "shall" protect the environment.

Another compelling reason for overruling *Preserve the Dunes* is that it appears from the instant case that the DEQ has done more than simply issue a permit that would result in the harm of natural resources. It has also granted an easement over state land to facilitate the harmful actions. Under *Preserve the Dunes*, the DEQ cannot be required to account for its actions. By overruling *Preserve the Dunes*, this Court can restore the accountability that was intended under MEPA.

Because the *Preserve the Dunes* decision to insulate DEQ permit decisions from MEPA violated the Legislative intent behind MEPA, conflicted with previous caselaw regarding MEPA, and subverted the will of the people contained in article 4 of Michigan's constitution, we overrule it.[9]

---

[9] We do not overrule *Preserve the Dunes* without proper consideration of the principle of stare decisis. The approach taken to stare decisis in any given case will be dependent on the facts and circumstances presented. See *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 854-855; 112 S Ct 2791; 120 L Ed 2d 674 (1992). Historically, many different approaches to stare decisis have been taken. See *Petersen v Magna Corp*, 484 Mich 300; 773 NW2d 564 (2009); *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 314-317; 791 NW2d 897 (2010) (HATHAWAY, J., concurring). The

B. *NESTLÉ* AND STANDING

In the order granting leave to appeal, we also asked the parties to brief whether *Nestlé* was correctly decided.[10] However, *Nestlé* has already been overruled in part.

One of the issues in *Nestlé* was whether the plaintiffs had standing to appear in court to protect property from being affected by the defendant's pumping of groundwater that it intended to bottle and sell. At the time, a majority of this Court held that the plaintiffs only had standing with respect to property that they owned or used, no more. *Nestlé*, 479 Mich at 285. The majority relied on the theory of standing adopted in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001). *Nestlé*, 479 Mich at 294-295. But this Court has recently explained that statutes granting standing should be applied as written, thus overruling the standing doctrine adopted in *Lee* and followed in *Nestlé*. *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 371 & n 18; 792 NW2d 686 (2010) (*LSEA*). Accordingly, MEPA, which specifies that "*any person* may maintain an action . . . against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution,

---

reasons given in Justice KELLY's dissent in *Preserve the Dunes*, and the further reasons given in this opinion, make clear that *Preserve the Dunes* must be overruled and the law must be returned to how it was applied before *Preserve the Dunes* was incorrectly decided.

[10] We also asked the parties to brief whether an easement could grant Merit riparian rights on land the state of Michigan owned. Under *Thompson v Enz*, 379 Mich 667; 154 NW2d 473 (1967), and its progeny, including *Little v Kin*, 249 Mich App 502; 644 NW2d 375 (2002), riparian rights may be conveyed to a nonriparian landowner by easement under certain circumstances. However, even assuming arguendo that the proposed easement in this case is valid, we conclude that the proposed use is unreasonable. Thus, it is unnecessary to consider this issue further.

impairment, or destruction," should be applied as it is written. MCL 324.1701(1) (emphasis added).

We therefore need not address the standing issue from *Nestlé*. Plaintiffs in this case have interests that differ from the citizenry at large.[11] *LSEA*, 487 Mich at 359. And, even if they did not, it is clear that under MEPA "any person" has standing to maintain an action protecting Michigan's natural resources; indeed, the Attorney General admitted at oral argument that that was the state's position as well. Because plaintiffs most certainly qualify under the statute's designation of "any person," plaintiffs would have standing regardless of this Court's decision in *Nestlé*.

C. REASONABLENESS OF THE PROPOSED KOLKE CREEK DISCHARGE

Nonetheless, this Court's decision to overrule *Nestlé* in *LSEA* did not affect the reasonable-use balancing test. In its *Nestlé* opinion, this Court explicitly declined to "pass on the merits" of, among other things, the "reasonable use balancing test" that had been applied by the Court of Appeals.[12] Thus, this Court has not passed judgment on the merits of that test.

The parties have agreed that the reasonableness of the water's use is the determining factor in deciding water-use cases,[13] and they have also all noted that the facts in this case are distinguishable from those in

[11] Plaintiffs use or own property along waterways that would be affected under Merit's proposed discharge plan.

[12] *Nestlé*, 479 Mich at 289 n 12, 291.

[13] While the parties agree that the reasonableness of the water's use is the determining factor in deciding water-use cases, they do not agree on using the "reasonable use balancing test" from *Nestlé*. We do not pass judgment on that test in this case because, under any test and by any standard, the discharge plan at issue is manifestly unreasonable.

Nestlé. In *Nestlé*, the diverted water was potable water being pumped out of the ground, packaged, and sold in many locations in and out of Michigan. In the instant case, contaminated water is being pumped from the ground in one watershed, treated and stripped of hydrocarbons but not fully decontaminated, and then pumped as surface water into a separate, previously uncontaminated watershed.

Plaintiffs focus much of their attention on the seminal Michigan water-law case of *Dumont v Kellogg*, 29 Mich 420 (1874), and its progeny[14] for the proposition that water cannot be diverted for an unreasonable use that would damage a riparian owner's use of the waterway. While it is true that Michigan courts have held that water should generally not be diverted from a watershed, we find that argument unpersuasive here. We distinguish *Dumont* and its progeny on the facts of this case.

Plaintiffs are seeking to protect the AuSable River watershed. Water is not being diverted from the AuSable River watershed in this case. The water that is being diverted is coming from the Manistee River watershed, and the reasonableness of merely diverting water out of the Manistee River watershed is not at issue. Thus, the cases that plaintiffs cite are not helpful on these facts.

It is clear from this Court's water-law precedent cited in both sides' briefs that an unreasonable use of water has never been deemed an allowable use and is not now an allowable use.[15] Defendants have presented no au-

---

[14] *Hall v City of Ionia*, 38 Mich 493 (1878); *Kennedy v Niles Water Supply Co*, 173 Mich 474; 139 NW 241 (1913); *Hoover v Crane*, 362 Mich 36; 106 NW2d 563 (1960).

[15] The cases cited include *Dumont*; *Hall*; *Schenk v City of Ann Arbor*, 196 Mich 75; 163 NW 109 (1917); *Kennedy*; and *Hoover*.

thority for the proposition that the diversion of contaminated water from one source to an uncontaminated watershed should be considered reasonable. It would be incongruous to hold that it is reasonable to decontaminate water by contaminating different water.[16]

Furthermore, it would be unconscionable and destructive for this Court to determine that it is reasonable to spread dangerous contamination throughout Michigan as we have described. The necessarily resulting harm would be spread not only to immediate downstream users but, in the end, to anyone in Michigan who relies, directly or indirectly, on our state's water remaining clean.

Accordingly, we affirm the lower courts' rulings preventing Merit's proposed discharge from the CPF into Kolke Creek.[17]

IV. CONCLUSION

We hold that Merit's discharge plan is not an allowable use of water because it is manifestly unreasonable. We hold that the DEQ can be sustained as a defendant in a MEPA action for its permitting decisions. We uphold the lower courts' determination that the proposed discharge plan is unreasonable, and we remand the case for reinstatement of the trial court's decision holding the DEQ accountable for violating MEPA.

---

[16] We do not hold that diverting water from one watershed to another is ipso facto unreasonable. Our concern today is with the discharge of contaminated water into an uncontaminated watershed.

[17] In reaching this decision, it is important to note that we focus our ruling on the reasonableness of using Kolke Creek as a discharge point for contaminated water removed from a separate watershed. We are not basing this decision on Merit's status as a riparian or groundwater user. We are not basing this decision on Merit's status as an off-tract or on-tract water user. And we are not basing this decision on the fact that Merit is seeking to divert water out of the Manistee River watershed.

Affirmed in part, reversed in part, and remanded.

HATHAWAY, J., concurred with DAVIS, J.

KELLY, C.J. (*concurring*). I concur in parts I, II, III(A), III(B), and IV of the lead opinion. I concur in the result only with respect to part III(C) of the lead opinion. I write separately to articulate my preferred approach to stare decisis.

Even when a decision is wrongly decided, we must apply the doctrine of stare decisis when deciding whether to overrule it. Our analysis should always begin with a presumption that upholding precedent is the preferred course of action.[1] That presumption should prevail unless effectively rebutted by the conclusion that a compelling justification exists to overturn it.[2] By contrast, when analyzing precedent that itself represents a departure from established caselaw, we should apply a decreased presumption in favor of upholding precedent.[3]

In determining whether a compelling justification exists to overturn precedent, the Court may consider numerous evaluative criteria, none of which, standing alone, is dispositive. These criteria include, but are not limited to, whether (1) the precedent has proved to be intolerable because it defies practical workability, (2) reliance on the precedent is such that overruling it would cause a special hardship and inequity, (3) related principles of law have so far developed since the prece-

---

[1] *Petersen v Magna Corp*, 484 Mich 300, 317; 773 NW2d 564 (2009) (opinion by KELLY, C.J.).

[2] *Id*.

[3] *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 303; 791 NW2d 897 (2010), citing *Adarand Constructors, Inc v Peña*, 515 US 200, 233-234; 115 S Ct 2097; 132 L Ed 2d 158 (1995).

dent was pronounced that no more than a remnant of it has survived, (4) facts and circumstances have so changed, or have come to be seen so differently, that the precedent no longer has significant application or justification, (5) other jurisdictions have decided similar issues in a different manner, (6) upholding the precedent is likely to result in serious detriment prejudicial to public interests, and (7) the prior decision was an abrupt and largely unexplained departure from then-existing precedent.[4]

Not all of these factors will be applicable in a given case. Nor is there a magic number of factors that must favor overruling a case in order to establish the requisite compelling justification. Rather, the conclusion about overturning the precedent should be reached on a case-by-case basis.

I believe that *Preserve the Dunes, Inc v Dep't of Environmental Quality*[5] was wrongly decided with respect to whether the Department of Environmental Quality (DEQ) may be liable for an alleged violation of the Michigan environmental protection act (MEPA) by issuing a permit.[6] However, this fact alone does not constitute the requisite compelling justification to overrule the decision. Instead, we must examine additional factors.

First, I consider whether *Preserve the Dunes* has proved intolerable because it defies practical workability. I believe that it does. The *Preserve the Dunes* majority held that the DEQ's issuance of a permit is "unrelated to" alleged environmental harm and thus

---

[4] *Petersen*, 484 Mich at 320.

[5] *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004).

[6] MCL 324.1701 *et seq*.

insulated from scrutiny under MEPA.[7] This conclusion was directly contrary to a simple reading of MEPA. MCL 324.1701(1) provides, in pertinent part:

> [*A*]*ny person* may maintain an action in the circuit court . . . where the alleged violation occurred or is *likely* to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources . . . from pollution, impairment, or destruction. [Emphasis added.]

Under the act, a plaintiff makes a prima facie case by showing "that the conduct of the defendant . . . is likely to . . . destroy . . . natural resources or the public trust in these resources."[8]

The *Preserve the Dunes* majority's conclusion that eligibility for a permit is unrelated to whether the conduct permitted will harm the environment is untenable. Issuance of a permit to an ineligible party to engage in an activity that will harm the environment will certainly allow "conduct . . . likely to pollute, impair, or destroy . . . natural resources or the public trust in these resources" under MCL 324.1703(1). Indeed, before *Preserve the Dunes*, this Court observed that a violation of a permitting procedure can support a prima facie claim under MEPA.[9] Thus, by gutting the environmental protections afforded to Michigan citizens by MEPA, *Preserve the Dunes* mocked our Legislature's intent to prevent environmental harm. Accordingly, *Preserve the Dunes* was inherently unworkable under the statutory provisions provided by the Legislature.

---

[7] *Preserve the Dunes*, 471 Mich at 511.

[8] MCL 324.1703(1).

[9] A "plaintiff's prima facie case is 'not restricted to actual environmental degradation but also encompasses probable damage to the environment as well.' " *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 25; 576 NW2d 641 (1998), quoting *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 309; 224 NW2d 883 (1975).

Second, I consider whether reliance interests weigh in favor of overruling *Preserve the Dunes*. I conclude that they do. *Preserve the Dunes* is of relatively recent vintage, having been decided a mere six years ago. Hence, any reliance on its holding has been of limited duration. Moreover, *Preserve the Dunes* represented a sea change in one area of the law and toppled settled interpretations of MEPA that had existed for nearly 30 years.[10] In doing so, *Preserve the Dunes* disrupted the reliance interests of Michigan citizens who relied on MEPA's provisions to bring suit for alleged environmental pollution, impairment, or destruction.

I recognize that there exists a competing reliance interest in the continuing validity of *Preserve the Dunes*: that of the DEQ in defending its permitting decisions. Yet *Preserve the Dunes*' annihilation of the crux of a MEPA complainant's claim—the desire to quell environmental degradation—effectively removed altogether the ability to challenge permitting decisions as allowed by MEPA. I conclude that, while the DEQ's reliance on this interpretation is understandable, it is not sufficient to preclude overruling *Preserve the Dunes* given the extent of prejudice to those availing themselves of MEPA's straightforward language.

Third, I consider whether related principles of law have developed since *Preserve the Dunes* was decided. This factor is inapplicable to my stare decisis analysis in this case, as no intervening change in the law further supports or undermines the continuing legitimacy of *Preserve the Dunes*.

---

[10] See, e.g., *Eyde v Michigan*, 393 Mich 453, 454; 225 NW2d 1 (1975); *Ray*, 393 Mich at 304-305; *West Mich Environmental Action Council v Natural Resources Comm*, 405 Mich 741, 751; 275 NW2d 538 (1979); *Nemeth*, 457 Mich 16.

Fourth, I examine whether facts and circumstances have so changed, or have come to be seen so differently, that *Preserve the Dunes* has been robbed of significant justification. Like the previous factor, I discern no factual or circumstantial changes that counsel for or against overruling *Preserve the Dunes*. Therefore, this factor is also inapplicable to my analysis.

Fifth, I consider whether other jurisdictions have decided similar issues in a different manner. This factor is likewise inapplicable to my stare decisis analysis. MEPA is unique to our state. Although other states' environmental legislation may share the fundamental underpinnings of MEPA, judicial interpretations thereof have evolved independently of those of other states with similar environmental schemes. Thus, other jurisdictions' interpretations of similar statutes are unhelpful to our analysis in this case.

Sixth, I examine whether upholding *Preserve the Dunes* is likely to result in serious detriment prejudicial to public interests. This factor weighs heavily in favor of overruling *Preserve the Dunes*. In one swoop of a pen, the *Preserve the Dunes* majority obliterated environmental protection statutes enacted by the Legislature. As persuasively noted by Justice DAVIS, MEPA was enacted in response to our state's constitutional commitment to the conservation and development of the natural resources. Our constitution provides:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. *The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.*[11]

---

[11] Const 1963, art 4, § 52 (emphasis added).

Furthermore, as we stated in *Ray*:

> Michigan's EPA was the first legislation of its kind and has attracted worldwide attention. The act also has served as a model for other states in formulating environmental legislation. The enactment of the EPA signals a dramatic change from the practice where the important task of environmental law enforcement was left to administrative agencies without the opportunity for participation by individuals or groups of citizens. Not every public agency proved to be diligent and dedicated defenders of the environment. The EPA has provided a sizable share of the initiative for environmental law enforcement for that segment of society most directly affected—the public.
>
> * * *
>
> But the EPA does more than give standing to the public and grant equitable powers to the circuit courts, it also imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities.[12]

Thus, whereas MEPA represents the culmination of the Legislature's deliberative process, *Preserve the Dunes* undermined the Legislature's decision to allow challenges to both real and potential harms to the environment. The impact of *Preserve the Dunes* was undoubtedly felt not only by the environment, but by the public. The citizens of Michigan were stripped of their ability to enforce environmental protection mechanisms granted by the Legislature.

Finally, I consider whether *Preserve the Dunes* represented an abrupt and largely unexplained departure from precedent. I conclude that this factor also weighs heavily in favor of overruling *Preserve the Dunes*. As

---

[12] *Ray*, 393 Mich at 304-306.

previously noted, *Preserve the Dunes* implicitly overruled numerous previous decisions of this Court interpreting MEPA.[13] Those decisions stood as principled interpretations of MEPA until *Preserve the Dunes* unexpectedly swept them aside decades later. Therefore, *Preserve the Dunes* represented an abrupt and unexplained departure from precedent.

In summary, *Preserve the Dunes* (1) is unworkable because it usurped the Legislature's grant of a cause of action regarding environmental harm, (2) caused serious detriment prejudicial to public interests, and (3) represented an abrupt and largely unexplained departure from precedent. Accordingly, I conclude that a compelling justification exists for overruling it.

CAVANAGH, J., concurred with KELLY, C.J.

YOUNG, J. (*dissenting*). I respectfully, but vigorously, dissent from the extraordinarily lawless and profoundly dangerous lead opinion and from the results reached by a majority of this Court.

This case represents one of the most shocking examples of the assertion of power that is not grounded in the constitution or any statute. This case is simply an empty vehicle to reach desired policy results.[1] This is so because this case was moot in June 2010 when the majority inexplicably denied defendants' meritorious motion to dismiss for mootness;[2] this case was moot in November 2010 when this Court heard oral arguments

[13] See n 10 of this opinion.

[1] The shocking paucity of legal authority relied on by the lead opinion is a prime indicator that no more than naked judicial policymaking is afoot.

[2] *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 486 Mich 982 (2010).

on the case, despite its obvious mootness; and this case remains moot today, despite the majority's raw exercise of power in deciding a nonjusticiable case. The lead opinion does not even attempt to respond to this dissent because there *are* no satisfactory responses. Because I continue to believe that this Court should not decide moot cases, I would dismiss this appeal.

Unwilling to forgo the opportunity to resolve a nonexistent conflict to attack precedent with which they disagree, the lead and concurring opinions overturn this Court's decision in *Preserve the Dunes v Dep't of Environmental Quality*[3] that the Department of Environmental Quality (DEQ)[4] may not be sued under the Michigan environmental protection act (MEPA)[5] for issuing a permit. Indeed, the lead and concurring opinions now conclude that the DEQ may be sued even if the permit it issued was already successfully challenged under the appropriate administrative procedures. Furthermore, the lead opinion fashions a new common law rule governing water rights *out of whole cloth and without citing any authority for its new categorical rule.* Instead, the lead opinion's categorical rule usurps the ability of the DEQ's environmental experts to determine what action appropriately protects the natural resources held in public trust, and it usurps the ability of lower courts to judge the validity of those expert analyses by interposing a categorical rule prohibiting "contamination," regardless of actual harm to the relevant watercourse. Because Michigan law has not heretofore provided for such a categorical rule, I must

[3] *Preserve the Dunes v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004).

[4] The DEQ is now part of the Michigan Department of Natural Resources and Environment (DNRE).

[5] MCL 324.1701 *et seq*.

vigorously dissent from this palpably erroneous decision. Again, the lead opinion reaches its decision on the substantive merits of this case without responding to *any* of the critiques I make of its argument.

I. FACTS AND PROCEDURAL HISTORY

Defendant Merit Energy Company owns land in the Manistee River watershed that contains a plume of contaminated groundwater. When Merit purchased the land, the contaminated plume already existed and threatened private wells for drinking water. Merit's purchase of the land was contingent on an agreement with the DEQ requiring Merit to remediate the plume. Accordingly, Merit devised a corrective action plan to treat the contaminated water and to discharge the treated water into Kolke Creek, part of the AuSable River watershed. To effect this plan, Merit obtained an easement from the Michigan Department of Natural Resources (DNR)[6] to "place, construct, operate, repair and maintain [a] Pipeline" beginning on Merit's property and ending at Kolke Creek. Merit also sought DEQ approval of its plan. The DEQ issued a certificate of coverage (COC), which affirmed that the proposed discharge was consistent with a general permit that allowed "discharges of wastewater contaminated by gasoline and/or related petroleum products . . . ." Therefore, Merit received the requisite certification that it could discharge under "a valid national or state permit . . . ."[7]

Plaintiffs include riparian owners along Kolke Creek. They challenged the COC in a contested case hearing

[6] The DNR is now part of the DNRE. However, at the time the DNR granted Merit an easement, it was a separate executive agency.

[7] Mich Admin Code, R 323.2106(1).

pursuant to the Administrative Procedures Act.[8] After the administrative referee affirmed the DEQ's decision, plaintiffs appealed by right to the Otsego Circuit Court. In addition to appealing the contested case decision, plaintiffs brought original claims against defendants for alleged MEPA violations and alleged violations of plaintiffs' common law riparian rights. The circuit court separated plaintiffs' appeal of the contested case decision from their original claims and remanded the contested case decision for review by the director of the DEQ. The director affirmed the administrative decision to issue Merit a COC. On appeal, the circuit court vacated the COC because the discharge allowed under the COC contained contaminants beyond those allowed under the general permit the COC purported to enforce. The circuit court's decision invalidating the COC remains in force.[9]

The circuit court conducted a 13-day bench trial to consider plaintiffs' common law and MEPA claims. The court held that the DNR's proposed easement did not provide Merit with the necessary riparian rights to discharge *anything* into Kolke Creek.[10] The circuit court also concluded that the proposed discharge would violate plaintiffs' riparian rights. In reaching this decision, the court applied the "reasonable use balancing test" that the Court of Appeals articulated in *Mich Citizens for Water Conservation v Nestlé Waters North America*

[8] MCL 24.201 *et seq*.

[9] The Court of Appeals denied defendants' delayed application for leave to appeal. This Court initially remanded the appeal to the Court of Appeals for consideration as on leave granted, 482 Mich 1078 (2008), but subsequently granted reconsideration and denied the application, 483 Mich 887 (2009). Accordingly, the circuit court's vacation of the COC remains intact.

[10] The circuit court subsequently clarified its order to indicate that the DNR *could* assign its riparian rights to Merit, but that it had not done so in the easement before the court.

Inc.[11] Because "[t]he proposed use is for the benefit of distant non-riparian parcels at the expense of local riparian rights" and because "[t]he delicate ecosystem of Kolke Creek is not a suitable location for the discharge of treated water in the quantities proposed," the court concluded that the proposed discharge would constitute an unreasonable use of Kolke Creek. Accordingly, it enjoined defendants from discharging the treated water into Kolke Creek in the volume proposed, 1.15 million gallons a day. The court also determined that plaintiffs had presented a prima facie MEPA violation with respect to both Merit and the DEQ.

Defendants appealed in the Court of Appeals, and plaintiffs filed a cross-appeal in that court. The DEQ challenged the circuit court's ruling that it could be sued on the theory that its COC violated MEPA. Merit challenged the circuit court's conclusions regarding the scope of the DNR's easement, the application of the "reasonable use balancing test" in determining that the proposed discharge was unreasonable, and the application of MEPA and the common law to the proposed discharge.[12] On cross-appeal, plaintiffs argued that the circuit court should not have applied the *Nestlé* "reasonable use balancing test" because, as part of the common law pertaining to groundwater, it was inapplicable to their surface water riparian rights.

A unanimous Court of Appeals panel reversed in part the circuit court's ruling.[13] Citing this Court's opinion

---

[11] *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25; 709 NW2d 174 (2005), aff'd in part, rev'd in part, and remanded on other grounds 479 Mich 280 (2007).

[12] Defendants also raised several evidentiary errors, none of which are at issue in the instant appeal.

[13] *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 283 Mich App 115; 770 NW2d 359 (2009).

in *Preserve the Dunes*,[14] the Court of Appeals concluded that the DEQ's administrative decision to issue permits to Merit did not violate MEPA. The Court of Appeals also reversed the circuit court's ruling on the scope of the DNR's easement to Merit and concluded that the DNR conveyed the right to discharge water, which the panel characterized as "inherently riparian and therefore connected to, rather than apart from, the land."[15] However, the Court of Appeals affirmed the circuit court's application of the "reasonable use balancing test,"[16] thereby leaving in place the injunction against Merit's proposed discharge.

Plaintiffs sought leave to appeal in this Court, claiming that this Court should, among other requested relief, overturn the "reasonable use balancing test" and this Court's decisions in *Preserve the Dunes* and *Mich Citizens for Water Conservation v Nestlé Waters North America Inc.*[17] Defendant Merit did not cross-appeal. This Court granted plaintiffs' application for leave to appeal on January 29, 2010, and specifically asked the parties to brief, among other issues, "whether *Michigan Citizens v Nestlé Waters* . . . and *Preserve the Dunes v DEQ* . . . were correctly decided."[18]

In the intervening period, however, Merit quitclaimed its interest in the easement back to the newly combined Department of Natural Resources and Environment and provided thorough documentation to this Court to prove that it had done so. Accordingly, Merit

---

[14] *Preserve the Dunes*, 471 Mich at 512.

[15] *Anglers*, 283 Mich App at 131-132.

[16] *Id.* at 136.

[17] *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007).

[18] *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 485 Mich 1067 (2010) (citations omitted).

moved to dismiss, claiming that plaintiffs' appeal was moot because Merit had abandoned its plan to discharge water into Kolke Creek, as evidenced by its relinquishment of the DNR easement. Because Merit no longer had physical access to Kolke Creek, it argued that it could not violate MEPA or plaintiffs' common law riparian rights in the way plaintiffs alleged. Further, Merit offered proof that it had filed for a new groundwater discharge permit to achieve its treatment goals by an alternative plan that would avoid discharging treated water into Kolke Creek. Nevertheless, a majority of this Court denied Merit's motion to dismiss for mootness on June 18, 2010.[19]

II. STANDARD OF REVIEW

This case implicates issues of constitutional law, statutory interpretation, and the common law. Each of these issues is a question of law, which this Court reviews de novo.[20]

III. JUSTICIABILITY

A. BACKGROUND

This Court has the constitutional authority to exercise only the judicial power, not "powers properly belonging to another branch . . . ."[21] The people of Michigan have ratified this "cardinal principle"[22] of republican government into each of their successive constitutions since the first, the Michigan Constitution

---

[19] *Anglers*, 486 Mich 982.

[20] *Little v Hirschman*, 469 Mich 553, 557; 677 NW2d 319 (2004).

[21] Const 1963, art 3, § 2.

[22] *Civil Serv Comm v Auditor General*, 302 Mich 673, 683; 5 NW2d 536 (1942).

of 1835.[23] Moreover, this principle is " 'in harmony with American political theory . . . .' "[24] Indeed, the drafters of the United States Constitution made it clear that each branch of government could not exercise the powers of the other two branches.[25] James Madison considered the principle of separation of powers essential to the operation of the federal government:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.[26]

Madison went on to explain that, despite the strong disagreements between federalists and antifederalists

---

[23] Const 1908, art 4, § 2 ("No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution."); Const 1850, art 3, § 2 ("No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution."); Const 1835, art 3, § 1 ("The powers of the government shall be divided into three distinct departments; the Legislative, the Executive and the Judicial; and one department shall never exercise the powers of another, except in such cases as are expressly provided for in this constitution.").

[24] *Civil Serv Comm*, 302 Mich at 683, quoting *Wood v State Admin Bd*, 255 Mich 220, 224; 238 NW 16 (1931).

[25] See US Const, art I, § 1 ("*All* legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.") (emphasis added); US Const, art II, § 1 ("*The* executive Power shall be vested in a President of the United States of America.") (emphasis added); US Const, art III, § 1 ("*The* judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.") (emphasis added).

[26] Madison, The Federalist No. 47.

over the proper scope of the federal government, all agreed that the tripartite form of government was sacrosanct:

> It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers.[27]

In the nearly two and a quarter centuries since the United States Constitution's ratification, the separation of powers doctrine has become "[p]erhaps the most fundamental doctrine in American political and constitutional thought . . . ."[28]

Although the Michigan Constitution does not expressly define "the judicial power," as early as 1859, this Court limited the judicial power to "the power to hear and determine controversies between adverse parties, and questions in litigation."[29] Justice THOMAS COOLEY wrote:

> [A] marked difference exists between the employment of judicial and legislative tribunals. The former decide upon the legality of claims and conduct, and the latter make rules upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what is the law *upon existing cases*.[30]

Justice CHAMPLIN applied this principle in *Risser v Hoyt*, explaining:

---

[27] Madison, The Federalist No. 48.

[28] *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 418; 792 NW2d 686 (2010) (CORRIGAN, J., dissenting).

[29] *Daniels v People*, 6 Mich 381, 388 (1859).

[30] Cooley, Constitutional Limitations (1st ed), p 92 (emphasis added).

> [T]he exercise of judicial power in its strict legal sense can be conferred only upon courts named in the Constitution. The judicial power referred to is the authority to hear and decide controversies, and to make binding orders and judgments respecting them.[31]

Thus, there is more than a century and a half of authority from this Court that limits the constitutional power of the judiciary to deciding live cases and controversies between interested parties. Moreover, the current constitutionally defined exceptions to this rule[32] help to prove the rule itself:

> In considering whether the Court should have the power to issue advisory opinions in nonadversarial proceedings at the request of other branches of government, the delegates' entire discussion was clearly premised on the *unquestioned assumption* that the judicial power, generally, was rooted in a case or controversy requirement. At the outset, Delegate Harold Norris explicitly asked with regard to the proposed section: "Does that mean that as far as this committee is concerned, they do not wish to preserve *the traditional notion that there must be a case or controversy presented before the court may exercise its judicial power*?" 1 Official Record, Constitutional Convention 1961, p 1544 (emphasis added). When the question was raised whether the power to issue an advisory opinion would be equivalent to the courts' preexisting power to issue declaratory judgments, Delegate Eugene Wanger similarly specified that the courts' preexisting power, even in the arena of declaratory judgments, distinctly required "an actual controversy be-

---

[31] *Risser v Hoyt*, 53 Mich 185, 193; 18 NW 611 (1884).

[32] See Const 1963, art 9, § 32 (conferring standing upon "[a]ny taxpayer of the state" to bring suit to enforce the provisions of the Headlee Amendment); Const 1963, art 11, § 5 (empowering "any citizen of the state" to bring injunctive or mandamus proceedings to enforce the civil service laws of the state); Const 1963, art 3, § 8 (allowing either house of the Legislature or the Governor to request that this Court issue an advisory opinion on the "constitutionality of legislation").

tween individuals . . . ." *Id.* at 1545. Delegate Raymond King may have expressed the understanding most clearly when he remarked:

> "*We are indeed contemplating a very serious change in what I think to be the history and the tradition of justice in this country*. Mr. Wanger has pointed out the troubles that the Massachusetts supreme court got into when they allowed themselves *to leave the theory of case and controversy*." [*Id.* at 1546 (emphasis added).]

Indeed, even with regard to the limited expansion of judicial power represented by the proposed advisory opinion provision, delegates were expressly concerned that it would "adversely affect[] the separation of powers doctrine . . . ." *Id.* at 1545 (Delegate Wanger); see also *id.* at 1546 (Delegate Jack Faxon indicating that the convention "should be wary of any violation of the separation of powers"); *id.* at 1547 (Delegate King stating: "I think we have established through the English common law and our adherence thereto a system of justice, a system of separation of powers which has proven itself, and I think we ought to be very reluctant at this time to try something new.").[33]

More recently, this Court has articulated the following core definition of the judicial power:

> The "judicial power" has traditionally been defined by a combination of considerations: the existence of a real dispute or case or controversy; the avoidance of deciding hypothetical questions; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making.

---

[33] *Lansing Sch Ed Ass'n*, 487 Mich at 423-425 (CORRIGAN, J., dissenting).

> Perhaps the most critical element of the "judicial power" has been its requirement of a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute, *Muskrat v United States*, 219 US 346; 31 S Ct 250; 55 L Ed 246 (1911), and one in which the plaintiff has suffered a "particularized" or personal injury. *Massachusetts v Mellon*, 262 US 447, 488; 43 S Ct 597; 67 L Ed 2d 1078 (1923). Such a "particularized" injury has generally required that a plaintiff must have suffered an injury distinct from that of the public generally. *Id.*[34]

This case involves an issue central to this Court's constitutional exercise of the judicial power: mootness.[35]

B. ANALYSIS

The long-established mootness doctrine prevents courts from hearing abstract questions of law in cases that no longer contain live controversies. This Court has recently reaffirmed that moot questions generally cannot be adjudicated.[36] *People v Richmond* is merely the most recent affirmation of this well-established principle and is entirely consistent with over a century of precedent of this Court.

---

[34] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 615; 684 NW2d 800 (2004). *Nat'l Wildlife* was overruled by *Lansing Sch Ed Ass'n*, 487 Mich 349.

[35] This Court also asked the parties to brief whether *Nestlé* was correctly decided. *Nestlé* involved an aspect of this Court's standing doctrine: the injury-in-fact requirement. In that case, this Court held that "[w]here the plaintiff claims an injury related to the environment, this Court lacks the 'judicial power' to hear the claim if the plaintiff cannot aver facts that he has suffered or will imminently suffer a concrete and particularized injury in fact." *Nestlé*, 479 Mich at 295. It is improvident for this Court to consider the broader question that *Nestlé* presented because there is no serious doubt that plaintiffs have standing under *Nestlé*.

[36] *People v Richmond*, 486 Mich 29, 35-41; 782 NW2d 187 (2010).

Street R Co of East Saginaw v Wildman, an 1885 case of this Court, is an especially apt application of the mootness doctrine.[37] In *Street R Co*, the plaintiff railroad sought to enjoin the defendant from moving a building along its railroad tracks "to the great interruption of its business and profits, the serious inconvenience of the public, and the hindrance and delay of the United States mails which it carried . . . ."[38] Shortly after the trial court dismissed the plaintiff's claim, but before the plaintiff appealed in this Court, the defendant moved the building, thereby negating any ability for a court to prevent the claimed harm through the injunctive relief sought. On appeal, this Court determined that "[i]f the complainant was ever entitled to the [equitable] relief prayed for, we cannot now make any decree to aid it" because "[w]e can hardly prevent [the defendant] from doing what has already been done."[39]

In a subsequent case, *Anway v Grand Rapids R Co*, this Court further articulated the scope of the judicial power as it related to moot questions:

> "Courts of judicature are organized only to decide real controversies between actual litigants. When, therefore, it appears, no matter how nor at what stage, that a pretended action is not a genuine litigation over a contested right between opposing parties, but is merely the proffer of a simulated issue by a person dominating both sides of the record, the court, from a sense of its own dignity, as well as from regard to the public interests, will decline a determination of the fabricated case so fraudulently imposed upon it."[40]

---

[37] *Street R Co of East Saginaw v Wildman*, 58 Mich 286; 25 NW 193 (1885).

[38] *Id.*

[39] *Id.* at 287.

[40] *Anway v Grand Rapids R Co*, 211 Mich 592, 612-613; 179 NW 350 (1920), quoting *Judson v Flushing Jockey Club*, 14 Misc 350; 36 NYS 126, 127 (NY Common Pleas, 1895).

The Court concluded with a nonexhaustive list of cases in which the Michigan Supreme Court had previously "declined to consider abstract questions of law and which [it] declined to decide where our conclusions could not be made effective by final judgment, decree, and process . . . ."[41]

The facts of this case make clear that *Merit no longer has the physical means of discharging treated water into Kolke Creek*, and the circuit court *vacated the certificate of coverage issued by the DEQ*. Thus, the very harms that plaintiffs sought to enjoin no longer exist. Merit has no legal means to injure plaintiffs.[42] The plain fact that the lead opinion ignores is that this Court simply cannot

---

[41] *Anway*, 211 Mich at 622, citing *Schouwink v Ferguson*, 191 Mich 284; 157 NW 726 (1916) (involving mandamus against a municipality to issue a license to operate a motorbus business that, by its own terms, would have expired before the writ of mandamus could have entered); *Carlson v Wyman*, 189 Mich 402; 155 NW 418 (1915) (involving mandamus against a municipality to issue a liquor license that, by its own terms, would have expired before the writ of mandamus could have entered); *Howe v Doyle*, 187 Mich 655; 154 NW 62 (1915) (involving an appeal of an injunction prohibiting the Michigan Securities Commission from enforcing a blue sky law that the Legislature had since repealed); *Street R Co*, 58 Mich 286; *Hicks v J B Pearce Co*, 158 Mich 502; 122 NW 1087 (1909) (involving an injunction prohibiting the sale of chattels that had already been sold); *Brown, ex rel Van Buren v Lawrence*, 197 Mich 178; 163 NW 872 (1917) (involving a quo warranto proceeding questioning the legitimacy of a corporate officer's ouster after that officer had since been elected again to the corporate board); *Ideal Furnace Co v Int'l Molders' Union*, 204 Mich 311; 169 NW 946 (1918) (involving an appeal of a contempt citation that had since been discharged by payment of the disputed fine); *Blickle v Grand Rapids Bd of Ed*, 210 Mich 196; 177 NW 385 (1920) (involving mandamus against a school board to admit a student who had since become too old to attend the school); *Tierney v Union Sch Dist of Bay City*, 210 Mich 424; 177 NW 955 (1920) (involving an appeal seeking an injunction prohibiting a school board from expending monies to campaign for a ballot proposal after the election had already occurred).

[42] Further, *any* renewed plan to discharge water into Kolke Creek would require Merit to undertake anew not only the DEQ's permitting

remedy harms that cannot now possibly occur.[43] Stunningly, all of this is a matter of indifference to those who subscribe to the lead opinion's result. Apparently, the conclusive facts of the case are of no moment or hindrance when the goal is to use this case as a vehicle to reach policy objectives that the lead opinion wishes to address.

As established by *Street R Co* and subsequent caselaw regarding mootness, it obviously follows for all but a majority of this Court that, without the threatened construction and use of the pipeline and without *any* DEQ permit authorizing the discharge, there remains no threatened injury to plaintiffs' riparian rights, and certainly none that this Court can remedy. Similarly, there remains no threatened MEPA violation, either by Merit or by the DEQ.

In short, plaintiffs' common law riparian rights and their rights under MEPA are secure. *Indeed, plaintiffs do not now contend that they have an immediate injury at stake*; they nevertheless want this Court to rule on the substantive legal issues—for the benefit of *future* cases. This is the definition of mootness. Again, the *Street R Co* decision provides guidance:

---

process, which plaintiffs may challenge through the appropriate administrative process, but also the negotiation of a new easement with a riparian landowner.

[43] The conclusion that the harm plaintiffs feared cannot possibly occur is further strengthened by evidence that Merit is heavily invested in an alternative plan for discharge. Merit's discharge permit and corrective action plan have been modified to allow its alternative plan. Merit is now discharging the water by alternative means, albeit with considerable costs to the company. Specifically, Merit relates that its current modified permit allows for a much lower discharge volume, which will extend the time required to clean up the plume that previously threatened the surrounding private drinking wells. Further, the new plan required Merit to clear-cut 40 acres of forest in order to construct infiltration basins.

> It was suggested on the hearing that we ought to settle the rights of the parties so that the principle established might be a guide in other cases likely to arise. But courts of equity will not lend their aid by injunction for the enforcement of a right or the prevention of a wrong in the abstract, not connected with any injury or damage to the person seeking relief, nor when such injury or damage can be fully and amply recovered in an action at law. Nor are courts of equity established to decide or declare abstract questions of right for the future guidance of suitors.[44]

In their brief opposing Merit's motion to dismiss, plaintiffs claimed that this case fits into an exception to the mootness doctrine, that "the issue is one of public significance that is likely to recur, yet evade judicial review."[45] Not so.

The issues presented here are *not* the sorts of issues whose transitory nature—often because the issues involved are time-sensitive—makes it likely that future litigation would "evade judicial review."[46] To the con-

---

[44] *Street R Co*, 58 Mich at 287.

[45] *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002).

[46] *Socialist Workers Party v Secretary of State*, 412 Mich 571, 582 n 11; 317 NW2d 1 (1982). *Socialist Workers Party* cited several federal cases for the proposition that a court can consider a moot question that is capable of repetition, yet evading review, including *Storer v Brown*, 415 US 724; 94 S Ct 1274; 39 L Ed 2d 714 (1974) (allowing a constitutional challenge to a California requirement that a person may not run for election as an independent candidate within six months of having been a registered member of a political party after the plaintiff had met the independence requirement); *Dunn v Blumstein*, 405 US 330; 92 S Ct 995; 31 L Ed 2d 274 (1972) (allowing a constitutional challenge to a Tennessee voter eligibility requirement that a person be a resident of the state for one year after the plaintiff had met the residency requirement); *Moore v Ogilvie*, 394 US 814; 89 S Ct 1493; 23 L Ed 2d 1 (1969) (allowing a constitutional challenge to an Illinois requirement that independent candidates for presidential electors receive at least 200 signatures from each of at least 50 of the state's 102 counties); *Southern Pacific Terminal Co v Interstate Commerce Comm*, 219 US 498; 31 S Ct 279; 55 L Ed 310

trary, any riparian owner aggrieved by the actions or imminently threatened actions of another can seek injunctive or other relief.

The lead opinion claims that "the trial court has left open the door for Merit to discharge treated water into Kolke Creek at a lower than originally proposed rate."[47] This claim appears plausible when looking solely at the circuit court's June 26, 2007, amended opinion. But that opinion was superseded by subsequent events. In particular, the circuit court's January 31, 2008, opinion ruled that the DEQ had erroneously issued a permit to Merit. Both the Court of Appeals and, eventually, this Court denied defendants' applications for leave to appeal, leaving intact the circuit court's opinion. Accordingly, even if the circuit court's June 26, 2007, decision "left open the door for Merit to discharge treated water into Kolke Creek," its January 31, 2008, decision closed that door, and this Court's denial of leave bolted the door shut. Further, without *either* physical access to Kolke Creek *or* a valid permit, Merit has no lawful authority to discharge *any* amount of *anything* into Kolke Creek.

In short, there is not a clearer instance of mootness than this case: the action originally challenged by plaintiffs can no longer be physically or legally accomplished by *any* of the defendants. Nevertheless, a majority of this Court has seen fit to decide the substantive issues of this case. The decision of four members of this Court to proceed on the substantive merits is profoundly flawed and inconsistent with longstanding

(1911) (allowing a challenge to a temporary ICC cease and desist order after the order had already expired). See also *Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973) (allowing a constitutional challenge to a Texas abortion law after the plaintiff had given birth).

[47] *Ante* at 75 n 4.

principles of constitutional law. Worse still, the lead opinion is itself profoundly flawed and inconsistent with longstanding principles of the common law and of statutory interpretation. Therefore, I am compelled to respond seriatim to the lead opinion's substantive claims.

IV. PLAINTIFFS' COMMON LAW RIPARIAN CLAIMS

I vigorously dissent from the lead opinion's creation of a new common law rule that certain discharges of contaminants are per se unreasonable infringements on riparian owners' rights. Unfortunately, I fear that the haste to render a decision in this case before the end of calendar year 2010, while perhaps grounded in a good intention to protect this state's environmental resources, could result in great mischief to the law. Indeed, "[g]ood intentions, unsupported by well informed policy choices, often result in bad law."[48] In its haste to fashion its rule, the lead opinion elided several necessary inquiries.[49] More troubling, the lead opinion

---

[48] Young, *A judicial traditionalist confronts the common law*, 8 Tex R L & Pol 299, 307 (2004).

[49] For a preliminary example, the lead opinion assumes, without deciding, that the DNR's easement allowed Merit to discharge treated water into Kolke Creek. The lead opinion acknowledges that this issue is properly before the Court, because "[t]he trial court . . . made findings as to whether Merit had properly obtained rights to discharge the treated water through the state-land easement." *Ante* at 74 n 3. Yet the lead opinion refuses to reach this issue because it "[did] not find those issues to be outcome-determinative . . . ." *Ante* at 74 n 3. The lead opinion puts the cart before the horse in making this determination without explanation, because this issue is a condition precedent to every subsequent one in this section. This is another indicator that the lead opinion is not interested in legal analysis but instead is driven to reach a particular result. Nevertheless, I agree with the Court of Appeals that, because the easement unambiguously allowed Merit to "operate" the pipeline, the easement purported to grant Merit the right to discharge treated water into Kolke Creek.

created out of whole cloth a palpably erroneous common law standard that is not grounded in this state's water law.

A. REASONABLENESS OF EASEMENT AND PROPOSED DISCHARGE

Although plaintiffs have won at all levels below on the issue whether the *proposed* discharge would have violated their riparian rights, they challenge the under-

---

The lead opinion also refuses to decide whether the DNR *can* grant an easement for Merit's physical access to Kolke Creek, instead claiming that "it is unnecessary to consider this issue" because "even assuming arguendo that the proposed easement in this case is valid, . . . the proposed use is unreasonable." *Ante* at 81 n 10. Plaintiffs argue that the easement impermissibly severed the DNR's riparian rights from the land and claim that, because the easement benefits a nonriparian tract, it violates the requirement in *Thompson v Enz*, 379 Mich 667; 154 NW2d 473 (1967), that limits artificial riparian uses to those benefitting the riparian land itself.

Michigan law allows the DNR to grant Merit an easement to access Kolke Creek precisely because it does *not* operate to sever the DNR's underlying riparian rights from the land. This Court's decision in *Thompson* is instructive inasmuch as it proves the *opposite* of plaintiffs' argument. *Thompson* involved a developer's attempt to divide a large parcel of land adjoining a lake into several smaller parcels, so that some of the newly created parcels no longer touched the lake. Nevertheless, the developer sought to maintain riparian rights on the parcels no longer touching the lake. The Court rejected this attempt, concluding that "riparian rights are not alienable, severable, divisible or assignable apart from the land which includes therein, or is bounded, by a natural water course." *Id*. at 686 (opinion by T. M. KAVANAGH, J.). However, *Thompson* also recognized that riparian rights could be granted by easement: "While riparian rights may not be conveyed or reserved[,] . . . easements, licenses and the like for a right-of-way for access to a water course do exist and ofttimes are granted to nonriparian owners." *Id*. Such an access grant is exactly what occurred here. The instant easement provided access to Kolke Creek, which included the right to dispose of treated water into Kolke Creek. The Court of Appeals correctly determined that "plaintiffs' argument does not hold water." *Anglers*, 283 Mich App at 132.

lying law that the lower courts applied to the analysis.[50] The lower courts applied the "reasonable use balancing test" as outlined in the Court of Appeals' *Nestlé* opinion. Plaintiffs claim that this was erroneous, first, because the *Nestlé* panel ignored or changed Michigan water law and, second, because the instant panel improperly extended *Nestlé*'s groundwater decision to competing *riparian* surface water claims.

The *Nestlé* "reasonable use balancing test" applies a multifactor balancing test to determine whether the alleged violation of a plaintiff's water rights (in *Nestlé*, groundwater rights, and in the instant case, surface riparian rights) amounts to an unreasonable infringement of those rights. The *Nestlé* panel defined the "reasonable use balancing test" as follows:

> While the nature of the balancing test requires that the appropriate factors be ascertained on a case-by-case basis, . . . several factors can be discerned that will be relevant to every application of the test. These factors include (1) the purpose of the use, (2) the suitability of the use to the location, (3) the extent and amount of the harm, (4) the benefits of the use, (5) the necessity of the amount and manner of the water use, and (6) any other factor that may bear on the reasonableness of the use.
>
> When determining the purpose of the use, the court should consider whether the use is for an artificial or a natural purpose and whether the use benefits the land from which the water is extracted. Natural purposes include all those uses necessary to the existence of the user and his or her family, including the use of the water for drinking and household needs. . . . Further, in order to ensure that the needs of local water users are met first, water uses that benefit the riparian land or the land from which the groundwater was removed are given preference

[50] Merit has not cross-appealed the lower courts' decisions that its proposed discharge violates plaintiffs' riparian rights, although it argues that the lower courts applied the appropriate test.

> over water uses that ship the water away or otherwise benefit land unconnected with the location from which the water was extracted.
>
> In assessing the suitability of the use to the location, the court should examine the nature of the water source and its attributes. A particularly large aquifer, stream, or lake may be unaffected even by extensive water withdrawals, whereas a marginal water resource may be unduly strained even by relatively modest withdrawals. . . .
>
> In assessing the harm and benefits, the court should examine not only the economic harm and benefits to the parties, but should also examine the social benefits and costs of the use, such as its effect on fishing, navigation, and conservation. . . .
>
> The court should also examine the extent, duration, necessity, and application of the use, including any effects on the quantity, quality, and level of the water. If the amount or method of water use is excessive or unnecessary and harms another's use, it will be unreasonable. Furthermore, if the harm caused by a water use can be readily modified to mitigate or eliminate the harm, the failure to take such steps may make the particular use unreasonable.[51]

The lead opinion refuses to determine whether the *Nestlé* panel's "reasonable use balancing test" might be appropriate in some instances, but it conclusively determines this test to be inappropriate in the instant case because the proposed discharge was "manifestly unreasonable."[52] Although the lead opinion cautions that it is not concluding that "diverting water from one watershed to another is ipso facto unreasonable,"[53] it does provide a categorical rule regarding *contaminants* when it observes that "[i]t would be incongruous to hold

---

[51] *Nestlé*, 269 Mich App at 71-74 (opinion by SMOLENSKI, J.) (citations omitted).

[52] *Ante* at 72.

[53] *Ante* at 84 n 16.

that it is reasonable to decontaminate water by contaminating different water."[54] The categorical rule that the lead opinion fashions in its haste to render a decision in this case is inconsistent with longstanding principles of Michigan water law.

This Court's decision in *Attorney General ex rel Wyoming Twp v Grand Rapids*[55] provides a prime example of the lead opinion's determination—willful or not—to ignore longstanding principles of Michigan water law. *Wyoming Twp* is particularly significant because it employed a reasonable use balancing test under circumstances similar to the facts here. In *Wyoming Twp*, the plaintiff riparian owners sought to enjoin the defendant city—also a riparian owner—from discharging its citizens' sewage into the Grand River. It is clear from the facts of the case that many of the citizens whose land was therefore benefitted lived on nonriparian parcels. Further, as will often be the case when a governmental entity disposes of sewage, it is possible—and potentially likely—that citizens of the defendant lived on land *outside the watershed*. But such facts were irrelevant; the Court's decision rested entirely on a reasonable use test to balance the rights of the competing riparian owners to use the waterway as they saw fit.

Writing for the majority, Justice STONE applied a balancing test to determine the extent to which the plaintiffs' riparian rights suffered as a result of the defendant's discharge. The Court explained that "city has the right to make a reasonable use of the waters of the river as a riparian owner."[56] Accordingly, it articulated a rule that "where an *unreasonable* pollution of

---

[54] *Ante* at 84.

[55] *Attorney General ex rel Wyoming Twp v Grand Rapids*, 175 Mich 503; 141 NW 890 (1913).

[56] *Id.* at 534.

the water, *amounting to a nuisance, or impairing the rights of the lower riparian proprietor*, is created or maintained, an injunction will issue to restrain its continuance."[57]

The central issue was the plaintiffs' ability to exercise *their* riparian rights, not simply the defendant's pollution of the Grand River. The Court explained: "Sewage cannot be thrown into the stream *in such a way as to render the water foul and unfit for use.*"[58] It emphasized that *discharges of pollutants themselves* were not *per se* impermissible; only the harmful effect of a *particular* discharge rendered it impermissible:

> The maxim, "Use your own property in such a manner as not to injure that of another," can equitably be applied to the defendants in this case. It appears undisputed that the construction of a septic tank or tanks by the defendants within a reasonable time is feasible and practicable, and that thereby the sewage would be relieved from contaminating properties and so purified as to take away the offensive, unhealthful, and nauseating odors.[59]

Accordingly, the Court enjoined the defendant from discharging sewage "until the same shall have first been, by the use of a septic tank or tanks, so deodorized and purified as not to contain the foul, offensive, or noxious matter (which it now contains) *capable of injuring the complainants or their property, or causing a nuisance thereto . . . .*"[60]

The Court explicitly tied the reasonableness of a riparian discharge to the existence of a private nuisance. The two concepts are related because the existence of a private nuisance is *itself* dependent on

---

[57] *Id.* at 535 (emphasis added).

[58] *Id.* at 538 (emphasis added).

[59] *Id.* at 543.

[60] *Id.* (emphasis added).

whether the defendant's actions " 'constitute unreasonable interference with the use and enjoyment of the land.' "[61] Overall, the Court's decision in *Wyoming Twp* shows not only that the *Nestlé* panel's "reasonable use balancing test" is firmly rooted in the Michigan common law, but also that such a test was applied historically even when a riparian owner used a waterway to benefit nonriparian lands. By contrast, the lead opinion's claim that *any* pollutant from a different watershed discharged into Kolke Creek is unreasonable per se is a sharp divergence from established Michigan water law.

Indeed, historical water law in Michigan consistently supports the lower courts' application of the "reasonable use balancing test" instead of the lead opinion's new categorical common law rule. Michigan riparian law dates to Justice COOLEY's 1874 decision in *Dumont v Kellogg*.[62] In *Dumont*, the defendant "constructed a dam across a natural water course, and by means thereof wrongfully detained the water in the stream to the prejudice and injury of the plaintiff, who was proprietor of a mill previously erected on the stream below."[63] The claim of error involved the trial court's instruction of the law to the jury, and so the Court articulated the proper law involving competing riparian claims. Justice COOLEY determined that equality of riparian ownership requires some sort of balancing of riparian interests:

> But as between different proprietors on the same stream, the right of each qualifies that of the other, and the question always is, not merely whether the lower propri-

---

[61] *Adkins v Thomas Solvent Co*, 440 Mich 293, 305; 487 NW2d 715 (1992), quoting Prosser & Keeton, Torts (5th ed), § 87, p 623.

[62] *Dumont v Kellogg*, 29 Mich 420 (1874).

[63] *Id.*

> etor suffers damage by the use of the water above him, nor whether the quantity flowing on is diminished by the use, but whether under all the circumstances of the case the use of the water by one is reasonable and consistent with a correspondent enjoyment of right by the other. "Each proprietor is entitled to such use of the stream, so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the same stream above and below." . . . It is a fair participation and a reasonable use by each that the law seeks to protect. . . . It is therefore not a diminution in the quantity of the water alone, or an alteration in its flow, or either or both of these circumstances combined with injury, that will give a right of action, if in view of all the circumstances, and having regard to equality of right in others, that which has been done and which causes the injury is not unreasonable. In other words, the injury that is incidental to a reasonable enjoyment of the common right can demand no redress.[64]

This Court also articulated important principles involving riparian rights in *People v Hulbert*.[65] The central issue in *Hulbert* was whether, by swimming in the lake on which he owned property, the defendant criminally polluted the lake, which also served as a water supply to the city of Battle Creek. The prosecution presented expert witnesses who testified "that germs might have been thrown off the body of the respondent while swimming, which would produce disease, and that some of those germs might reach the intake pipe, and through it the consumers of the water, and be a source of ill health," even though "[i]t is not shown any such

---

[64] *Id.* at 423-425, quoting *Cary v Daniels*, 49 Mass (8 Met) 466, 476-477 (1844).

[65] *People v Hulbert*, 131 Mich 156; 91 NW 211 (1902).

germs ever did reach the intake pipe, or that any illness in Battle Creek could be traced to the use of the water taken from this lake."[66]

Writing for the majority, Justice MOORE concluded that Michigan and foreign caselaw made it clear "that the lower proprietor [i.e., the city] has no superior right to the upper one, and may not say to him that, because the lower proprietor wants to use the water for drinking purposes only, the upper proprietor may not use the water for any other purpose."[67] Rather,

> [e]ach proprietor has an equal right to the use of the stream for the ordinary purposes of the house and farm, even though such use may in some degree lessen the volume of the stream, or affect the purity of the water. . . . This right is not affected by the fact that the lower proprietor is a municipality instead of an individual.[68]

The Court also implicitly required a fact-intensive balancing of the rights and effects of the riparian users:

> In what we have said we do not mean to intimate that an upper proprietor may convert his property into a summer resort, and invite large numbers of people to his premises for purposes of bathing, and give them the right possessed only by the riparian owner and his family. We are undertaking to decide only the case which is presented here.[69]

As this explication of Michigan water law shows, the lead opinion's creation of a categorical common law rule out of whole cloth is hasty and inconsistent with established water law. Believing that it is "unconscionable and destructive for this Court to determine that it is reasonable to spread dangerous contamination

---

[66] *Id.* at 159.

[67] *Id.* at 173.

[68] *Id.*

[69] *Id.* at 174.

throughout Michigan,"[70] the lead opinion nevertheless would adopt a categorical rule *without requiring a finding that the contamination is, in fact, "dangerous" to the watershed at issue!* This is so because the circuit court *only* made an initial finding of fact that the *volume* of the proposed discharge (1.15 million gallons a day) could cause unreasonable harm to plaintiffs. It did not find that the treated water was harmful to Kolke Creek *regardless of* volume; to the contrary, the circuit court specifically ruled that "the parties' proximity to and use of the watercourse, as well as the *volume*, source, and nature of the proposed discharge, were considered while determining whether the proposed discharge would be reasonable." Furthermore, its decision expressly contemplated that defendants might offer a planned discharge of contaminant that *would* be reasonable. Instead of reviewing the factual determinations of the circuit court, the lead opinion makes a ruling as a matter of law that *any* amount of discharge is *per se* unreasonable. There is simply no basis in law or fact for its ruling.

Incredibly, the lead opinion reaches its preferred result by creating a new categorical rule *both* without citing a single case in support *and* with apparent unawareness that caselaw has *already established* how courts should weigh water use on the basis of whether it benefits riparian or nonriparian land, if the specific facts of a case warrant a distinction.[71] Citing longstanding precedent of this Court, the Court of Appeals panel in *Nestlé* expressly held that "water uses that benefit

---

[70] *Ante* at 84.

[71] The reasons underlying some courts' distinctions between riparian and nonriparian benefits would generally apply equally to any distinction between on-watershed and off-watershed uses. But, notably, the lead opinion's categorical new rule for off-*watershed* uses—as opposed to uses benefitting nonriparian lands, generally—appears drawn from thin air.

the riparian land . . . are given preference over water uses that . . . benefit land unconnected with the location [of the water withdrawal]."[72] A court should "ensure that the needs of local water users are met first . . . ."[73] Indeed, as the lower courts obviously concluded here, the factors listed in *Nestlé* directly address, on the basis of historical tests for reasonableness, each of plaintiffs' concerns about Merit's proposed water use. For example, *Nestlé* also asserted that "natural purposes," including "uses necessary to the existence of the user and his or her family," take precedence over artificial uses.[74] As is particularly relevant to plaintiff Anglers of the AuSable, Inc., a court must also consider the proposed use's "effect on fishing, navigation, and conservation."[75] Finally, the circuit court's ruling clearly took into account the *Nestlé* panel's holdings that "[i]f the amount or method of water use is excessive or unnecessary and harms another's use, it will be unreasonable," and "if the harm caused by a water use can be readily modified to mitigate or eliminate the harm, the failure to take such steps may make the particular use unreasonable."[76]

The lead opinion's conclusion that Merit's proposed use is manifestly unreasonable simply because it involves two watersheds is unnecessary and displays a patent disregard for the rule of law and for this Court as an institution. Its unreasoned conclusion also threatens vast negative consequences for the residents and businesses of this state.

---

[72] *Nestlé*, 269 Mich App at 72.

[73] *Id.*

[74] *Id.* at 71-72.

[75] *Id.* at 73.

[76] *Id.* at 73-74 (citations omitted).

B. POTENTIAL CONSEQUENCES OF THE LEAD OPINION'S RULE

With little explanation that cites no proposition of law, save the unremarkable and uncontested principle that an unreasonable use of a watershed is prohibited, the lead opinion upends water law and declares a categorical per se rule precluding any amount of contaminant into Kolke Creek. The lead opinion attempts to bouleverse the existing law of this state, the negative impacts of which attempt cannot fully be foreseen. It fails to account even for several obvious hypothetical situations in which its unbending rule inappropriately precludes *reasonable* discharges that do not harm riparian owners' rights.

For example, suppose the presence of a contaminant in a small watershed causes significant harm to the environment and to the people living within that watershed. Suppose further that environmental engineers determine that diverting that contaminant to a large watershed (or several other watersheds) via riparian owners' access easements would not harm the water contained in the larger watershed because the contaminant is safe when diluted in a large body of water. In this situation, the diversion would not harm the riparian rights of the larger watershed's users, but it would significantly improve the environmental conditions of the smaller watershed. Nevertheless, the lead opinion's categorical rule would seem to provide riparian owners at the point of discharge a cause of action to enjoin the discharge, *despite no finding of harm to the larger watershed*.

The lead opinion also seems to call into question whether and to what extent municipalities can discharge their residents' sewage. Suppose that a municipality's residents receive their water from one watershed and that the municipality discharges its residents'

sewage into a different watershed. May riparian owners at the point of discharge successfully enjoin the municipality from discharging its residents' sewage upon a simple showing that the discharge was created from water taken from a different watershed? Although the *Wyoming Twp* decision would allow this discharge (assuming a finder of fact were to make appropriate findings of reasonableness), the rationale of the lead opinion would forbid it.

Consider an even simpler scenario: may a farmer no longer import water during dry seasons to irrigate his crops if any amount of the water, once sprayed onto his land, will drain into a river? According to the rationale of the lead opinion, arguably he may not. It appears that it will not matter whether the farmer uses potentially damaging fertilizers or harmless organic ones—either would "contaminate" the water as it runs off the plants and soil—given that *actual* injury to the watershed from his irrigation is irrelevant under the lead opinion's categorical rule. Indeed, because the lead opinion never even defines "contamination," farmers are left to wonder: Is irrigation precluded if the off-watershed irrigation water is contaminated with mere soil? With plant matter? Further, because the lead opinion's rule makes it no longer appropriate to balance the benefits and detriments of the particular use in relation to other uses of the watershed, the categorical prohibition would not be superseded even if the farm were a significant source of food or economic support for the farmer's community.[77] Thus, the lead opinion's rule has the

[77] Significantly, we cannot assume that, even if the farmer's use does not *actually* injure the watershed or interfere with other riparian users, such hypothetical situations are irrelevant for the practical reason that no one will sue to enjoin the irrigation. To the contrary, a per se rule divorced from any factual inquiry into the nature and level of harm invites mischief, particularly when combined with the minimal test for

potential to cripple agriculture in this state—an industry that has an economic impact of more than $70 billion annually in this state's economy.[78]

These are only a few hypothetical situations that the lead opinion's categorical rule would seem to forbid. Yet as these examples make clear, application of the lead opinion's rule—which requires water use to be enjoined on the basis of a vague notion of "contamination" instead of on the basis of relative harm—would stifle activity that simply does not harm existing watersheds and that is clearly beneficial to the community at large.

The lead opinion also fails to address arguments of defendants and their amici curiae—which raise additional critical concerns about the soundness and workability of the new rule—that on-watershed and off-watershed uses may be impossible to differentiate under some facts. The lead opinion's categorical rule suggests that a watershed's boundaries are sacrosanct, yet it has provided no authority for this principle. It does not even note Merit's related observation that its land—like countless other parcels in Michigan—sits nearly on the border of the surface water divide between the AuSable and Manistee watersheds, exempli-

---

standing established by the majority in *Lansing Sch Ed Ass'n*, 487 Mich 349, relied on by the lead opinion here. Under the prudential standing test from that case, any user of the watershed may seemingly sue our farmer for reasons unrelated to either party's water needs and in disregard of the needs of the community. Indeed, another watershed user could sue simply because that user is, for example, a farm operator wishing to reduce competition or even a vindictive riparian neighbor who disapproves of the farmer's choice in overalls; neither plaintiff would have to show that he was *actually* harmed by the farmer's irrigation.

[78] Knudson & Peterson, *Second Interim Update on the Economic Impact of Michigan's Agri-Food and Agri-Energy System*, available at <http://www.productcenter.msu.edu/documents/2nd%20Interim%20Agri-Food%20Economic%20Impact.pdf> (accessed December 22, 2010).

fying Merit's argument that, as a matter of geographical fact, determining which watershed a parcel sits in is not always a black and white inquiry. Yet under the lead opinion's categorical rule, courts would have to make this determination, even when scientists and geographers cannot.

Finally, and most telling, as explained earlier, plaintiffs *successfully* enjoined Merit from discharging 1.15 million gallons a day into Kolke Creek in the instant original action, and they *successfully* vacated the DEQ's COC on appeal of the contested case decision. Those proceedings were designed to take into account the very analyses that the lead opinion elides: namely, whether the particular proposed discharge would *unreasonably* interfere with plaintiffs' riparian rights and whether it would violate Michigan's environmental laws. This case's procedural history illustrates that the careful balance Michigan's riparian law has struck for more than a century serves citizens of this state, including riparian owners such as plaintiffs, well: not one drop of treated water has ever been allowed to enter the bodies of water plaintiffs sought to protect; the permit that would have allowed a discharge was vacated; *and* plaintiffs were awarded fees and costs pertaining to their claims against Merit. This litigation demonstrates that there is no need to disturb Michigan's balanced and effective riparian law. Ultimately, the broad strokes that the lead opinion uses in its haste to render its preferred policy decision in this case would severely damage this state's common law and its economy.

V. PLAINTIFFS' MEPA CLAIMS

Plaintiffs claim that both Merit and the DEQ violated

MEPA.[79] MCL 324.1701(1) provides, in whole:

> The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

MCL 324.1703(1) requires the plaintiff to make "a prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources . . . ."

Plaintiffs claim that the DEQ's issuance of the COC "is likely to pollute, impair, or destroy" Kolke Creek and the AuSable River watershed in violation of MCL 324.1703(1).[80] The lower courts applied this Court's precedent in *Preserve the Dunes* to rule that the mere issuance of a permit is not itself "conduct" that "is likely to pollute, impair, or destroy the air, water, or

---

[79] As stated in part III(B) of this opinion, plaintiffs' MEPA claims are now moot. Their MEPA claim against Merit is moot because Merit no longer has either physical access to Kolke Creek or a valid DEQ permit. Their MEPA claim against the DEQ is moot because the circuit court has already vacated the underlying permit. Nevertheless, the majority has decided to rule that plaintiffs' MEPA claims against Merit and the DEQ may proceed. Therefore, while I would dismiss the entire case as moot, my analysis proceeds on the substantive merits of the claims.

[80] Plaintiffs also claim that Merit's proposed discharge "is likely to pollute, impair, or destroy" Kolke Creek and the AuSable River watershed in violation of MCL 324.1703(1). The circuit court agreed with plaintiffs that the proposed discharge would violate MEPA and enjoined Merit from undertaking its proposed discharge. The Court of Appeals affirmed the injunction, and Merit has not appealed that decision of the Court of Appeals. Accordingly, this Court is not presented with the substantive question whether Merit's proposed discharge violates MEPA.

other natural resources or the public trust in these resources" in violation of MCL 324.1703(1).

A. *PRESERVE THE DUNES* WAS CORRECTLY DECIDED

In *Preserve the Dunes*, the plaintiff sought to enjoin a sand dune mining operation for which the DEQ had granted a permit. Although the plaintiff did not challenge the mining operation's eligibility for the permit during the appropriate time for review, it sought to undertake a *collateral attack* on the permit's issuance, claiming that the DEQ's mere issuance of the permit violated MEPA.

Writing for the majority, Justice CORRIGAN explained that, even if the DEQ had erred by issuing the permit, "[a]n improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA."[81] Accordingly, the Court rejected the plaintiff's collateral attack on the issuance of the mining permit. Of course, the Court's holding that "[o]nly wrongful conduct offends MEPA" did nothing to prevent an action against the *mining operation* for harming the environment. Indeed, if nothing else, the opinion underscored that the appropriate avenue to enforce MEPA is to seek relief from the entities whose *actual conduct* violates or would imminently violate MEPA.

The lead opinion claims that *Preserve the Dunes* "frustrated the legislative intent behind MEPA, and . . . represented a departure from this Court's precedent."[82] To the contrary, *Preserve the Dunes* applied the language that the Legislature used in MEPA, and its holding was consistent with the holdings contained in this Court's earlier precedent.

---

[81] *Preserve the Dunes*, 471 Mich at 519.

[82] *Ante* at 78.

When interpreting a statute, courts must "ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute."[83] This requires courts to consider "the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' "[84] In enacting MEPA, the Legislature specified that it was regulating "*conduct* of the defendant [that] has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources . . . ."[85]

The word "conduct" is not defined in MEPA, nor is it defined in the Natural Resources and Environmental Protection Act,[86] within which all environmental regulations, including MEPA, fall. "[W]e give undefined statutory terms their plain and ordinary meanings."[87] Accordingly, it is appropriate to use a dictionary to determine the appropriate meaning of the word "conduct" in MCL 324.1703(1).[88] *Merriam-Webster's Collegiate Dictionary* defines "conduct," in relevant part, as "the act, manner, or process of carrying on[.]"[89] This definition makes it clear that conduct requires some sort of action.

It is apparent from the placement of the term "conduct" within MCL 324.1703(1) that not only must a

---

[83] *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

[84] *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

[85] MCL 324.1703(1) (emphasis added).

[86] MCL 324.101 *et seq*.

[87] *Koontz*, 466 Mich at 312.

[88] *Id.*

[89] *Merriam-Webster's Collegiate Dictionary* (1998).

defendant engage in "conduct" to violate MEPA, but the defendant's conduct must *itself* "pollute[], impair[], or destroy[] or [be] likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources . . . ." It is simply not the case that the issuance of a permit, by itself, pollutes, impairs, or destroys or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources.[90] While a permit might precede conduct that pollutes, impairs, or destroys this state's environmental resources, it does not do so without subsequent action by an individual or entity. The lead and concurring opinions thus have not shown how the mere issuance of a permit violates MEPA.

The lead opinion also claims that *Preserve the Dunes* "insulate[s] DEQ permit decisions from MEPA."[91] As already demonstrated, this case is a perfect illustration that this is simply untrue. Judicial review of agency decisions is available through an appeal to circuit court pursuant to the Administrative Procedures Act (APA) after a contested case hearing.[92] In other words, a person seeking judicial review of an administrative agency's issuance of a permit may assert that the agency failed to apply MEPA. As discussed, that is precisely what happened in this case. In plaintiffs'

---

[90] This conclusion is strengthened by a contextual reading of MEPA that considers the use of "conduct" in MCL 324.1705, which mandates that an agency make a pollution determination, and then states that "*conduct* shall not be authorized or approved that has or is likely to have [a polluting] effect . . . ." MCL 324.1705(2) (emphasis added). This provision recognizes a distinction between the "conduct" of a MEPA defendant and the "authorization" or "approval" of the agency. Thus, the language of the statute makes clear that the drafters of MEPA did not consider authorization or approval alone to constitute "conduct," just as *Preserve the Dunes* held.

[91] *Ante* at 80.

[92] MCL 24.302.

appeal of the contested case decision, the circuit court concluded that the DEQ's "approval of Merit's COC is illegal . . . because the proposed discharge and the proposed volume of discharge is likely to violate MEPA."

Accordingly, contrary to the lead opinion's unsupported assertion, the permitting process is far from "insulated." In this very case, MEPA was vindicated through an appropriate and entirely adequate procedural vehicle: the APA appeal. There was no need for plaintiffs to file a separate complaint under MCL 324.1701, alleging *again* that the MDEQ's issuance of the (already-invalidated) COC violated MEPA. As the procedural history of this case illustrates, and as *Preserve the Dunes* recognized, a MEPA case challenging the issuance of a permit constitutes an improper "collateral attack" that is nowhere contemplated by the statute.[93]

B. *PRESERVE THE DUNES* WAS CONSISTENT WITH THIS COURT'S PRECEDENT

The lead and concurring opinions also have not shown how *Preserve the Dunes* departed from this Court's precedent. The lead and concurring opinions both refer to several cases that they urge support their claim, but they fail to examine those cases in sufficient detail to show how they are inconsistent with *Preserve the Dunes*. In fact, the cases cited provide little support for the claim that *Preserve the Dunes* was incorrectly decided.

First, the lead and concurring opinions refer to *Eyde v Michigan*.[94] However, the plaintiffs in *Eyde* claimed that "the construction of a sewer [was] violative of"

[93] *Preserve the Dunes*, 471 Mich at 511.

[94] *Eyde v Michigan*, 393 Mich 453; 225 NW2d 1 (1975).

MEPA's predecessor statute.[95] Thus, *Eyde* unquestionably involved conduct, namely, the construction of a sewer. Moreover, the Court expressly indicated that its holding was "restricted to the unique facts of this case."[96] As a result, the lead and concurring opinions' reliance on this case is specious.

Second, the lead and concurring opinions refer to *Ray v Mason Co Drain Comm'r*.[97] *Ray* involved "the kind of findings of fact required of the trial judge . . . in deciding an action brought under" MEPA's predecessor statute.[98] *Ray* neither involved nor discussed whether the mere issuance of a permit can itself violate MEPA. Accordingly, it is simply irrelevant to the position that the lead and concurring opinions seek to advance.

Third, the lead and concurring opinions refer to *West Mich Environmental Action Council v Natural Resources Comm* (*WMEAC*).[99] The plaintiffs in *WMEAC* challenged a consent order between the Natural Resources Commission (NRC) and several private entities to allow oil and gas development in a state forest. Pursuant to that consent order, the NRC granted permits for those private entities to drill 10 exploratory wells in the forest. Even before the NRC granted those permits, however, the plaintiffs claimed that the consent order "was likely to lead to the impairment of wildlife in the Forest."[100] This Court's ultimate disposition was to order the trial court to enter "a permanent injunction prohibiting the drilling of the ten explor-

---

[95] *Id.*

[96] *Id.* at 456.

[97] *Ray v Mason Co Drain Comm'r*, 393 Mich 294; 224 NW2d 883 (1975).

[98] *Id.* at 298.

[99] *West Mich Environmental Action Council v Natural Resources Comm*, 405 Mich 741; 275 NW2d 538 (1979) (*WMEAC*).

[100] *Id.* at 750.

atory wells pursuant to permits issued on August 24, 1977."[101] Thus, this Court's injunction was not issued to enjoin the NRC from *issuing* permits or even to *vacate* the existing permits but to enjoin the *underlying conduct* that the permits purported to allow. *WMEAC* is, therefore, inapplicable to whether *Preserve the Dunes* was correctly decided.

Finally, the lead and concurring opinions refer to *Nemeth v Abonmarche Dev, Inc*.[102] *Nemeth* involved a proposed development in the city of Manistee that the plaintiffs alleged would cause soil and sand erosion. At issue in *Nemeth* was whether the developers' (undisputed) violations of the soil erosion and sedimentation control act (SESCA)[103] also violated MEPA. This Court concluded that substantive SESCA violations can present a prima facie MEPA violation. Thus, *Nemeth* similarly involved whether conduct underlying a permit—not the actual issuance of a permit—violates MEPA.

Accordingly, and contrary to the lead and concurring opinions' ipse dixit, *Preserve the Dunes* was not inconsistent with this Court's prior holdings.

C. THE LEAD OPINION'S ADDITIONAL RATIONALES

The lead opinion claims that it provides two additional "compelling justifications for overruling *Preserve the Dunes*."[104] Neither of these justifications withstands scrutiny.

First, the lead opinion claims that *Preserve the Dunes* violates article 4, § 52 of the Michigan Constitution, which indicates that the "conservation and development of the

---

[101] *Id.* at 760.

[102] *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16; 576 NW2d 641 (1998).

[103] MCL 324.9101 *et seq*.

[104] *Ante* at 78.

natural resources of the state . . . [are] of paramount public concern" and that "[t]he legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."[105]

This Court has recognized that the predecessor statute of MEPA was "the first legislation of its kind" and that its passage "attracted worldwide attention."[106] Nothing in *Preserve the Dunes* prevented any plaintiffs who alleged an imminent injury to their property from participating in what former Chief Justice WILLIAMS called "the important task of environmental law enforcement . . . ."[107] Indeed, plaintiffs here have *already succeeded* in enforcing MEPA by receiving an injunction preventing Merit from undertaking conduct that the circuit court concluded would violate MEPA. *Preserve the Dunes* did not stifle enforcement of MEPA. On the contrary, it focused enforcement of MEPA against those individuals and entities who are actually harming, or whose imminent conduct threatens to harm, this state's natural resources.[108]

The lead opinion also determines that *Preserve the Dunes* should be overruled because, in the instant case,

---

[105] Const 1963, art 4, § 52.

[106] *Ray*, 393 Mich at 304.

[107] *Id.* at 305.

[108] The lead opinion's holding has the opposite effect in that it arguably makes countless individuals and entities subject to MEPA claims, even when their "conduct" *itself* does not harm the environment. The lead opinion reasons that the DEQ is subject to a MEPA claim because its "permit process is entirely related to the environmental harm . . . ." *Ante* at 77. However, the lead opinion provides no guidance as to what nexus would be sufficient to satisfy its "entirely related" test. Should the bank that makes the loan for a building project on wetlands be subject to a MEPA suit? Should the contractor who supplies the labor? Should the builders themselves be? Certainly, by the lead opinion's reasoning, all of these individuals' "conduct" is "entirely related" to a harm, or to a likely harm, to the environment.

the DEQ "has done more than simply issue a permit that would result in the harm of natural resources" because it "has also granted an easement over state land to facilitate the harmful actions."[109] It is simply incongruous to assert that the holding in *Preserve the Dunes*—that the mere issuance of a permit does not constitute "conduct"—should be overruled because the lead opinion concludes that the DEQ's actions in the instant case exceeded the mere issuance of a permit! Indeed, nothing in *Preserve the Dunes* prohibited actions against administrative agencies whose conduct *actually* pollutes or threatens to pollute the environment. Moreover, the lead opinion is simply incorrect in stating that the DEQ granted Merit an easement to facilitate its allegedly harmful actions. The DNR granted the easement to Merit, not the DEQ. Although today they are within the same entity (the Department of Natural Resources and Environment), they were separate executive agencies at the time the easement was granted. Thus, to the extent that the DNR's act of granting the easement arguably can be said to have been actionable "conduct" violating the relevant environmental statutes, this is not related to DEQ's issuance of the permit. But this circumstance is not a problem for the lead opinion. Simply put, the lead opinion's argument that the issuance of the successfully challenged permit caused an environmental injury is specious.

D. STARE DECISIS PRINCIPLES MILITATE AGAINST OVERRULING *PRESERVE THE DUNES*

Not only does a majority of this Court erroneously conclude that *Preserve the Dunes* was incorrectly decided and was inconsistent with this Court's precedent,

[109] *Ante* at 80.

but the lead and concurring opinions do not seriously consider what effect the principle of stare decisis has on whether to overrule *Preserve the Dunes*. Stare decisis " 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' "[110]

Although the lead and concurring opinions (erroneously) conclude that *Preserve the Dunes* was wrongly decided, it is well established that "the mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate."[111] Instead, this Court must determine the effects of overruling its prior decision, "including most importantly the effect on reliance interests and whether overruling would work an undue hardship because of that reliance."[112] The lead opinion simply states, with no explanation, that "the law must be returned to how it was applied before *Preserve the Dunes* was incorrectly decided."[113] The lead opinion's failure to undertake this analysis with any degree of seriousness further illustrates its haste to render a decision.

In fact, the lead opinion fails to make this analysis because such an analysis shows that *Preserve the Dunes* should be maintained. To overrule *Preserve the Dunes*, even if it were wrongly decided, "would produce chaos."[114] The *Preserve the Dunes* majority's response to the dissent in that case provides a glimpse into the

---

[110] *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), quoting *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998).

[111] *Robinson*, 462 Mich at 465.

[112] *Id.* at 466.

[113] *Ante* at 81 n 9.

[114] *Robinson*, 462 Mich at 466 n 26.

world the lead opinion seeks to create, one in which no administrative decision achieves finality:

> Imagine the world that the dissent's reasoning would create. The present energy crisis offers a good example. For many years, our country has sought to decrease our reliance on foreign sources of oil. Suppose an oil company decided to invest in oil exploration in Michigan in reliance on a DEQ-issued permit. Under the dissent's view, MEPA would authorize a challenge at any time to flaws in the permitting process. Moreover, under the dissent's reasoning, a court must accept as true the bare assertion that a company's conduct will destroy natural resources. It can never rely on a permit to do business. What sane investor would take such a risk? As gas prices soar, few people in Michigan would thank this Court for "protecting" the environment in this radical fashion.
>
> The dissent's regime would render the permitting process a useless exercise. It would cripple economic expansion in Michigan and probably lead to disinvestment. No one would invest money to obtain a permit that is subject to endless collateral attacks.
>
> MEPA nowhere strips the permitting process of finality. It is the dissent that makes a mockery of legislative intent by failing to anchor its exaggerated claims in the statute's actual language. MEPA does not impose the radical requirement that courts indefinitely police administrative agencies' permit procedures and decisions.[115]

The lead opinion's rationale, such as it is, provides scant assurance that it has considered how disruptive overruling *Preserve the Dunes* will be to this state.

The concurring opinion attempts to undertake an analysis of stare decisis principles, but it also falls short of proving that *Preserve the Dunes* should be overruled. In particular, the lead and concurring opinions have not shown how *Preserve the Dunes* defies "practical work-

---

[115] *Preserve the Dunes*, 471 Mich at 523.

ability," another factor militating against its claim that *Preserve the Dunes* should be overruled.[116] To the contrary, even under *Preserve the Dunes*, the instant plaintiffs *successfully enjoined* the conduct that the DEQ's permit purported to allow and they *successfully challenged* the issuance of that permit on appeal from the appropriate administrative procedures. Indeed, if anything, this case shows how *Preserve the Dunes* appropriately and effectively interpreted Michigan's environmental law, permitting the successful protection of the environment and plaintiffs' riparian rights. This fact alone should have been persuasive to any jurist committed to stare decisis to avoid an unnecessary overruling of existing precedent.

Preserve the Dunes was correct when it was decided, and it remains correct today. The lead and concurring opinions have not provided any serious reason for determining otherwise.

VI. CONCLUSION

This case is moot. Not only has Merit voluntarily abandoned the easement that granted it physical access to Kolke Creek, the circuit court has also vacated the underlying DEQ permit that would have allowed it to make its proposed discharge. Accordingly, any substantive decision that this Court renders only affects the parties in the abstract. This Court has long stated that it is not a constitutional exercise of the judicial power to decide abstract cases. Therefore, I vehemently dissent from this Court's decision to render a substantive ruling in this case.

Furthermore, I strongly dissent from the lead opinion's unnecessarily disruptive disposition of the sub-

[116] *Robinson*, 462 Mich at 466.

stantive issues in this case. The lead opinion fashions out of whole cloth a categorical rule that "contaminated" water originating from one watershed can never be discharged into watercourses in another watershed because such a discharge inherently violates the riparian rights of landowners at the point of discharge. This decision has no basis in Michigan's well-established water law, under which the touchstone of "reasonableness" has served the citizens of this state, including these riparian plaintiffs, very well. Finally, the lead and concurring opinions' claim that *Preserve the Dunes* was wrongly decided is inconsistent with the plain language of MEPA and will wreak havoc on this state's legal system.

In short, the lead opinion's palpably erroneous decision and the concurring justices' acquiescence in the result of that decision are affronts to the rule of law and reflect the majority's unseemly haste to render a decision in this case before the end of calendar year 2010. The decision this Court renders today is a prime example of the naked exercise of power without constitutional warrant. While there may be some who will welcome today's result, they should fear a judiciary that is willing to bend the law to accomplish its will. Those who support it may live to see this decision further undermine the state's fragile economy.

For all the foregoing reasons, I respectfully, but strenuously, dissent.

CORRIGAN and MARKMAN, JJ., concurred with YOUNG, J.

2000 BAUM FAMILY TRUST v BABEL

Docket No. 139617. Argued October 5, 2010 (Calendar No. 3). Decided December 29, 2010.

The 2000 Baum Family Trust and other owners of lots fronting Lake Charlevoix, but separated from the water by a road that was dedicated to public use in a subdivision plat that was recorded pursuant to the 1887 plat act, brought an action in the Charlevoix Circuit Court against William Babel and other back-lot owners, the Charlevoix County Road Commission, and Charlevoix Township. Among other claims, plaintiffs sought injunctive relief against the back-lot owners' use of the waterfront. The road commission and the back-lot owners filed counterclaims, and additional back-lot owners were allowed to intervene as defendants and file counterclaims. Plaintiffs moved for partial summary disposition against the road commission only, contending that they have riparian rights. The court, Richard M. Pajtas, J., denied the motion, ruling that plaintiffs have no riparian rights. The Court of Appeals, FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ., affirmed, holding that the plain and unambiguous language of the 1887 plat act granted the public fee title to a dedicated roadway for the use and purposes stated in the dedication and that the road commission was in "no way" limited in the type of use it could make of the road. 284 Mich App 544 (2009). The Supreme Court granted plaintiffs' application for leave to appeal. 485 Mich 1051 (2010).

In an opinion by Justice MARKMAN, joined by Chief Justice KELLY and Justices CORRIGAN and YOUNG, the Supreme Court *held*:

Consistent with longstanding rules of property in this state, the property interest conveyed by a statutory dedication under the 1887 plat act in a public road that runs parallel to a body of water or watercourse did not divest the front-lot property owners of their riparian rights.

1. The property rights at issue involve a road that was dedicated by the plat act of 1887, which conveyed to the county a fee "in trust to and for the uses and purposes therein designated, and for no other use or purpose whatever." Decisions of the Supreme Court dating back well over a century illuminate the nature of this property interest and the corresponding rights the county re-

ceived. The county was conveyed an interest known as a "base fee," which includes nominal title only and not the usual rights of a proprietor conveyed by a common-law fee title.

2. Generally, for land to be considered riparian, it must touch the water. It is undisputed that the interposition of a common-law fee title between land and water destroys riparian rights. However, Michigan caselaw makes clear that a statutory base fee constitutes a property interest distinct from a common-law fee and is not a property interest capable of destroying riparian rights. No Michigan decision has ever held that a dedication of a base fee in a parallel road conveys riparian rights to the receiving government entity, and every Michigan decision that has addressed this issue has concluded that riparian rights rest with the front-lot owners.

3. All dedications of land to public use must be considered with reference to the use for which they are made. In this case, the plat indicated that "the streets and alleys as shown on said plat are hereby dedicated to the use of the public," which was understood to mean those rights of a public nature that exist in public ways of that kind. In Michigan, riparian rights have never been considered among such rights. While public ways that terminate at the edge of navigable waters have been deemed at common law to provide public access to the water, no decision in this state has ever held that a dedication of a road that runs parallel to the water conveys riparian rights. This is because the former type of road can provide public access to the water consistently with the primary purpose of a roadway, which is to provide public passage for all, and the latter cannot. Accordingly, the road commission cannot exercise riparian rights to the road at issue, including granting public access to the water, because such uses are incompatible with the underlying dedication.

Reversed and remanded.

Justice DAVIS, joined by Justices CAVANAGH and HATHAWAY, dissenting, would hold that, absent a contrary intent expressed by the plat proprietor, a statutory base fee constitutes a fee-ownership title vested in the county, and it therefore cuts off the riparian rights of abutting landowners.

PROPERTY — RIPARIAN RIGHTS — PLATS — STREET DEDICATIONS — FRONT-LOT PROPERTY OWNERS.

The property interest conveyed by a statutory dedication of a public road that runs parallel to a body of water or watercourse does not divest the owners of the properties in the first row of lots on the landward side of the road of their riparian rights.

Carey & Jaskowski, P.L.L.C. (by *William L. Carey*), for the 2000 Baum Family Trust and others.

Joel D. Wurster, PLC (by *Joel D. Wurster*), for the Charlevoix County Road Commission.

Amici Curiae:

Law Weathers (by *Clifford H. Bloom*) for the Michigan Waterfront Alliance and Higgins Lake Property Owners Association.

Levine Law Group, PLLC (by *Michael C. Levine*), for the County Road Association of Michigan.

MARKMAN, J. This case involves riparian rights.[1] Specifically, the parties ask us to decide an issue that was treated as unsettled by the lower courts: who possesses riparian rights to a portion of a lake, persons who are owners of property fronting the lake but separated from the water by a public road or a county road commission that has accepted a statutory dedication of the road and maintains it as such? The trial court ruled that the property owners (plaintiffs) did not possess riparian rights, and the Court of Appeals affirmed, further holding that the road commission (defendant) was in "no way" limited in the type of use it could make of the public road. *2000 Baum Family Trust v Babel*, 284 Mich App 544, 561; 773 NW2d 44 (2009). We reverse.

The road at issue, along Lake Charlevoix, was dedicated under the 1887 plat act. Many lots alongside

[1] As others have done, we observe that "[s]trictly speaking, land which includes or abuts a river is defined as riparian, while land which includes or abuts a lake is defined as littoral." *Thies v Howland*, 424 Mich 282, 288 n 2; 380 NW2d 463 (1985). However, "the term 'riparian' is often used to describe both types of land," *id*., and will be used in such a manner in this opinion.

Michigan's some 11,000 inland lakes were platted during this period and are separated from the water by a public road running parallel to the shoreline. The term of art that Michigan courts have long used to describe the property interest in dispute is a statutory "base fee." *Patrick v Young Men's Christian Ass'n of Kalamazoo*, 120 Mich 185, 191; 79 NW 208 (1899). Decisions of this Court dating back well over a century illuminate the nature of this property interest and the corresponding rights the county receives through a statutory dedication. *Bay Co v Bradley*, 39 Mich 163, 166 (1878) (stating that the county "acquire[d] no beneficial ownership of the land"); *Wayne Co v Miller*, 31 Mich 447, 448-449 (1875) (stating that the county did not receive "title in the nature of a private ownership"); *Backus v Detroit*, 49 Mich 110, 115; 13 NW 380 (1882) (stating that the county did not receive "the usual rights of a proprietor," but took title to the extent that it could "preclude questions which might arise respecting the public uses, other than those of mere passage"). Consistent with these holdings, the Court of Appeals has held that a statutory base fee does not divest front-lot[2] property owners of their riparian rights. *Mich Central Park Ass'n v Roscommon Co Rd Comm*, 2 Mich App 192; 139 NW2d 333 (1966); *Sheridan Drive Ass'n v Woodlawn Backproperty Owners Ass'n*, 29 Mich App 64; 185 NW2d 107 (1970); *Kempf v Ellixson*, 69 Mich App 339; 244 NW2d 476 (1976); *McCardel v Smolen*, 71 Mich App 560; 250 NW2d 496 (1976), vacated in part on other grounds in 404 Mich 89 (1978).

On the authority of this caselaw, and mindful that the imperatives of stare decisis are particularly strong

[2] "Front-lot" properties are in the first row of lots on the landward side of the disputed road. "Back-lot" properties are one or more rows further removed from the road and the lake.

in the area of property law, we hold that plaintiffs in this case have riparian rights, as similarly situated persons have always had in Michigan.

I. FACTS AND HISTORY

Plaintiffs own front lots in a platted subdivision on the northern shore of Lake Charlevoix. Their lots do not touch the shoreline. Rather, Beach Drive, which runs east to west and parallel to the lake, abuts the shoreline and separates plaintiffs' lots from the lake. In other words, plaintiffs' lots extend to the edge of the road, not to the water's edge. In addition to the Charlevoix County Road Commission (CCRC), defendants include back-lot owners and Charlevoix Township.

The plat includes six named streets, including Beach Drive. All these streets run parallel to the lake, except for Central Avenue, which cuts through the center of the plat and runs perpendicular to, and terminates at, the lake. The plat depicts a single dock extending into the lake at the end of Central Avenue, but there is no indication in the record whether this dock was ever built, or, if it did exist, how it was used.

The Charlevoix County Board of Supervisors accepted the plat and the dedication of the streets on August 7, 1911.[3] Concerning the roadways in the plat,

[3] The record does not contain information about the identity of the original plat proprietor. The minutes of the August 7, 1911, meeting at which the plat was accepted state that "Mr. D. C. Littleton presented the plat of North Charlevoix," although the plat itself indicates that its proprietor was "D. C. Nettleton." However, as we will discuss, the plat proprietor's identity is not material. All that is necessary to know for the purposes of this case is that the original plat proprietor completely parted with his interest in the land by conveying the lots without reserve. See *Turner v Holland*, 65 Mich 453, 463; 33 NW 283 (1887) ("[I]f there was no reservation, riparian rights would attach to lots bounded by navigable waters or natural water-courses.").

the dedication includes the following language: "[T]he streets and alleys as shown on said plat are hereby dedicated to the use of the public." It is undisputed that the public has continued since that time to accept the dedication of the roadways, including Beach Drive. Today, the CCRC maintains Beach Drive, which is now paved.[4]

From the time it accepted the dedication in 1911 until the instant lawsuit, the CCRC had never asserted a claim to riparian rights as a necessary incident to its interest in Beach Drive. The CCRC has never installed a dock along the lakeshore or otherwise engaged in riparian activities. Over the years, however, plaintiffs have used the lake in front of their lots and have built seasonal docks extending into the lake in order to moor boats and other water-related equipment. Furthermore, it is undisputed that there is neither a reservation nor a grant of riparian rights in plaintiffs' deeds and that their lots are taxed as "water view" properties rather than "waterfront" properties.

Allegedly, various back-lot owners began using the waterfront in front of plaintiffs' homes to maintain docks and store boats. In response, plaintiffs filed a complaint against defendants alleging claims of trespass and nuisance and seeking injunctive and equitable relief. The CCRC counterclaimed, alleging that plain-

[4] The CCRC did not exist at the time of the dedication. 1931 PA 130 transferred to the county road commissions the responsibility for the laying out and construction, improvement, and maintenance of township roads. *Robinson Twp v Ottawa Co Bd of Co Rd Comm'rs*, 114 Mich App 405, 410; 319 NW2d 589 (1982). As with all county road commissions, the CCRC is a statutorily created entity charged with the duty to construct and improve roads. MCL 224.19. As this Court has made clear, it is "only a governmental agency in the hands of the State highway commissioner used in the discharge of certain governmental duties, *i. e.* the repair and maintenance of State highways." *Johnson v Ontonagon Co Bd of Rd Comm'rs*, 253 Mich 465, 470; 235 NW 221 (1931).

tiffs had trespassed on Beach Drive by maintaining encroachments on the drive, including docks. The individually named back-lot defendants also counterclaimed, asserting claims of adverse possession or, alternatively, seeking a declaration that they possess easements, either by acquiescence or by prescription.

Plaintiffs moved for partial summary disposition against the CCRC alone, claiming that there is no issue of material fact regarding which party is entitled to riparian rights. Plaintiffs argued that because their lots were separated from the water by a roadway parallel to the water, their lots were riparian. In plaintiffs' view, the CCRC has a right to the use of Beach Drive as a roadway only. In response, the CCRC argued that plaintiffs did not possess riparian rights because the public holds Beach Drive in fee pursuant to the statutory dedication under the plat act, which means that plaintiffs' lots are not riparian. The back-lot defendants also filed a motion in response, arguing that plaintiffs did not possess riparian rights because, as shown on the plat, none of their properties abuts the lake.

The trial court denied plaintiffs' motion, ruling that they did not possess riparian rights. The court framed the issue as "whether Beach Drive is an easement with the fee title residing in the front lot owners or whether the public holds fee title." It ruled that the effect of a dedication is to "vest fee title in the local unit of government . . . ." It followed, in the court's view, that because plaintiffs "do not hold fee title to the waterfront land in front of their respective lots, they do not possess riparian rights."

The Court of Appeals granted plaintiffs' interlocutory application for leave to appeal and affirmed. *Baum*, 284 Mich App at 546, 549. That Court applied a "two-tier analysis: First, whether a valid statutory dedication

was created under the 1887 plat act and, second, if so, what type of fee interest has been vested in the public." *Id.* at 562. On the first question, the Court concluded that the act was "unambiguous" and that it clearly vested in the public a fee for public uses of the road. *Id.* at 557-559. The second question, the Court reasoned, required discerning the intent of the plat proprietor by examining the dedication.[5] The Court concluded that the "language of the dedication in no way limits what type of use may occur on the depicted streets or alleys or who may use them." *Id.* at 561.

We granted leave to appeal, including among the issues to be argued (1) whether the fee title resulting from the dedication of land for public uses in a plat under the 1887 plat act in land that runs along the shore of a lake conveys the riparian rights to the lake to the county or whether the conveyance is limited to public uses of the road as a road and (2) whether caselaw stating that front-tier lots adjacent to a road running along a waterway have riparian rights, unless such rights are expressly excluded, remains valid. *2000 Baum Family Trust v Babel*, 485 Mich 1051 (2010).

II. STANDARD OF REVIEW

The question presented on appeal is a question of law: Whether plaintiffs have riparian rights in this context in which their lots abut a roadway that runs parallel to the lakeshore and was dedicated under the 1887 plat act. We review issues of statutory interpretation and other questions of law de novo. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

---

[5] Plat proprietors are also known as "plattors."

III. LAW OF DEDICATION

The lower courts held that the nature of the property interest conveyed to the CCRC in the dedication of Beach Drive under the applicable plat act is such that it divested front-lot plaintiffs of their riparian rights. In addition, the Court of Appeals interpreted the dedication language as granting the CCRC unlimited use of the streets and alleys within the plat. Analysis of these conclusions requires an understanding of several aspects of Michigan property law. Therefore, before turning to the central questions at issue—(a) what is the nature of the property interest conveyed by the plat act and (b) how does this property interest affect riparian rights—some general legal background is necessary. In particular, we survey the law of dedication and consider the creation of public roads by dedication and the rights of landowners abutting such roads.

A. BACKGROUND

A "dedication" of land is an "appropriation of land to some public use, accepted for such use by or in behalf of the public." *Clark v Grand Rapids*, 334 Mich 646, 656-657; 55 NW2d 137 (1952). The essence of a dedication is that the covered land will be for the use of the public at large. See *Patrick*, 120 Mich at 191. From its earliest days, this Court has frequently considered disputes involving the dedication of land to the public. See, e.g., *People v Beaubien*, 2 Doug 256 (Mich, 1846); *Wanzer v Blanchard & Buckland*, 3 Mich 11 (1853); *Lee v Lake*, 14 Mich 12 (1865). These early decisions drew on a well-established body of law that had developed in federal, state, and English courts. See *Beaubien*, 2 Doug at 272-282, noting that the doctrine of dedication had been "of late much considered" and surveying the leading cases of the day, including *City of Cincinnati v*

White's Lessee, 31 US (6 Pet) 431; 8 L Ed 452 (1832); *Wyman v New York Mayor*, 11 Wend 486 (NY, 1834); *Hobbs v Town of Lowell*, 36 Mass (19 Pick) 405 (1837); and numerous English cases on the subject.

This realm of law was said to be "anomalous," in that "[u]nder it, rights are parted with and acquired in modes and by means unusual and peculiar." *Patrick*, 120 Mich at 193 (citations and quotation marks omitted). First, although ordinarily some conveyance or written instrument is required to transmit a right to real property, a "dedication may be made without writing, by act *in pais* [an act performed outside of legal proceedings], as well as by deed." *Id*. (citation and quotation marks omitted). In other words, the statute of frauds is not applicable to the dedication of land to the public. See *Baker v Johnston*, 21 Mich 319, 348 (1870). Second, like a charitable trust, there need be no grantee in being at the time of the dedication to give it effect. *Patrick*, 120 Mich at 190. Third, and most significant to the instant case,

> [i]t is not at all necessary that the owner should part with the title which he has, for dedication has respect to the possession, and not the permanent estate. Its effect is not to deprive a party of title to his land, but to estop him, while the dedication continues in force, from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has. [*Id*. at 193 (citation and quotation marks omitted).]

The enforcement of dedications was left to the law of estoppel. See *White's Lessee*, 31 US at 438 (holding that the original owner was estopped from revoking a dedication). But see *Lee*, 14 Mich at 17 (holding that "[n]o estoppel . . . could spring" unless the "circumstances in the case . . . make it inequitable" for the owner to revoke the dedication). This Court in *Patrick*, 120 Mich

at 193, gave this straightforward explanation of the "principle upon which the estoppel rests":

> [I]t would be dishonest, immoral, or indecent, and in some instances even sacrilegious, to reclaim at pleasure property which has been solemnly devoted to the use of the public, or in furtherance of some charitable or pious object. The law therefore will not permit any one thus to break his own plighted faith; to disappoint honest expectations thus excited, and upon which reliance has been placed. The principle is one of sound morals and of most obvious equity, and is in the strictest sense a part of the law of the land. It is known in all courts, and may as well be enforced at law as in equity. [Citation and quotation marks omitted.]

The law will give effect to a dedication of land that has been "solemnly devoted to the use of the public" for as long as the land continues to be exercised in accordance with its dedicated public use. *Id.* (citation and quotation marks omitted); see also *White's Lessee*, 31 US at 438.[6]

In sum, the rules of property governing dedications of land to the public are distinct, yet deeply rooted in the Anglo-American legal tradition. These rules have developed to accommodate the coexisting rights of the dedicator of land, his or her grantees, and the public. In balancing these rights, the use to which the dedication was made has always been at the fore. See *White's*

---

[6] Quoting the New York case of *Hunter v Village of Sandy Hill Trustees*, 6 Hill 407, 414-415 (NY, 1844), which concerned a dedication of a public graveyard, *Patrick*, 120 Mich at 194, provided this description of how long one is bound by a public dedication:

> "When these graves shall have worn away, when they who now weep over them shall have found kindred resting places for themselves, when nothing shall remain to distinguish this spot from the common earth around, and it shall be wholly unknown as a graveyard, it may be that someone who can establish a good 'paper title' will have a right to its possession, for it will then have lost its identity as a burial ground, and with that all right founded on the dedication must necessarily become extinct."

Lessee, 31 US at 438 ("All public dedications must be considered with reference to the use for which they are made[.]"). We are guided in the instant case by this first principle, and reaffirm the precept that we articulated well over a century ago in resolving a dedication dispute: "This being a case to which the law of dedication applies, the use for which the dedication was made must determine the extent of the right parted with by the owner of the land and acquired by the public." *Patrick*, 120 Mich at 193 (citation and quotation marks omitted).

B. PUBLIC ROADS BY DEDICATION

For a road to become public property, there must be (a) a statutory dedication and an acceptance on behalf of the public, (b) a common-law dedication and acceptance, or (c) a finding of highway by public user. *Village of Grandville v Jenison*, 84 Mich 54, 65-68; 47 NW 600 (1890) (discussing these three modes). Although it is undisputed that the road at issue here was dedicated by statute and accepted on behalf of the public, we will consider aspects of both common law and statutory dedications to gain insight into the similarities and differences between these modes of dedication.

1. COMMON-LAW DEDICATION

A valid common-law dedication of land requires (a) intent by the property owner to offer the land for public use, (b) an acceptance by, and maintenance of the road by, public officials, and (c) use by the public generally. *Bain v Fry*, 352 Mich 299, 305; 89 NW2d 485 (1958). If these are present, the dedication is sufficient regardless of form. *Badeaux v Ryerson*, 213 Mich 642, 647; 182 NW 22 (1921).

With regard to an intention to dedicate, all facts and circumstances bearing on the question are considered. See *Lee*, 14 Mich at 18. Acceptance is similarly fact-specific. It "may be either formal, by resolution or ordinance, or informal 'through user or expenditures of public money for the repair, improvement and control of the highway.' " *Rice v Clare Co Rd Comm*, 346 Mich 658, 665; 78 NW2d 651 (1956) (citation omitted). "A dedication must be accepted within a reasonable time or the offer will be considered as withdrawn." *Cass Co Bd of Supervisors v Banks*, 44 Mich 467, 476; 7 NW 49 (1880). Offers to dedicate are considered withdrawn when the owners of property use it in a way that is inconsistent with public ownership. *Lee*, 14 Mich at 18. What qualifies as an inconsistent use depends on the circumstances of each case. See *Field v Village of Manchester*, 32 Mich 279, 280 (1875), in which the Court considered the fact that the landowner had erected buildings, fenced in an enclosure, and planted fruit trees in a portion of a disputed street as evidence of use inconsistent with dedication and public ownership.

"Common-law dedications do not ordinarily convey the fee. In fact, under the strict rule they never do." *Patrick*, 120 Mich at 211. " 'By the common law, the fee in the soil remains in the original owner, where a public road is established over it; but the use of the road is in the public. The owner parts with this use only.' " *People, ex rel Dep't of Conservation Dir v LaDuc*, 329 Mich 716, 719; 46 NW2d 442 (1951), quoting *Barclay v Howell's Lessee*, 31 US (6 Pet) 498, 513; 8 L Ed 477 (1832). Accordingly, as this Court stated in *Loud v Brooks*, 241 Mich 452,456; 217 NW 34 (1928):

> We hold the correct rule to be that a conveyance of land bounded on a highway, street, or alley carries with it the fee

> to the center thereof, subject to the easement of public way, provided the grantor at the time of conveyance owned to the center and there are no words in the deed showing a contrary intent . . . .

2. STATUTORY DEDICATION

To create a public road by statutory dedication, two elements are required: (a) "a recorded plat designating the areas for public use, evidencing a clear intent by the plat proprietor to dedicate those areas to public use, and [b] acceptance by the proper public authority." *Kraus v Dep't of Commerce*, 451 Mich 420, 424; 547 NW2d 870 (1996). While this Court has stated that the "acknowledgment and recording of the plat had all the force and effect of an express grant," *Kirchen v Remenga*, 291 Mich 94, 109; 288 NW 344 (1939), public acceptance is always required, *Miller*, 31 Mich at 448-449. In *Miller*, Justice COOLEY explained why public acceptance is necessary regardless of whether a recorded plat is considered a grant or offer to dedicate:

> Without venturing to express any definite opinion whether such a plat should be regarded as a grant or as a mere offer to dedicate, it is very clear to our minds that it is one or the other, or perhaps partakes of the nature of both, and that some action by competent public authority is essential before it can have the intended effect. If the plat is only an offer to dedicate, the offer must be accepted or it may be withdrawn, and after any considerable lapse of time must be regarded as no longer open for acceptance, unless the circumstances are such as to make the offer continuous. On this subject our own decisions have been full and explicit.
>
> But if the plat is regarded as a grant, it is equally necessary that there should be acceptance. No one can thrust a grant upon another without his assent. It is true, acceptance of a grant may be presumed when it is benefi-

> cial, but there can be no conclusive presumption that a grant of land for a public way is so. [*Id*. at 449-450 (citations omitted).]

Under any other rule, duties and financial responsibilities would be imposed on the government for dedicated roads that it never knowingly or intentionally accepted. Equally undesirably, land would become waste property, owned or developed by no one. These concerns were addressed in *Miller*, 31 Mich at 449:

> As the execution and recording of the plat is wholly a private matter, subject to no public supervision whatever, this view would enable proprietors of lands to lay out so many streets and avenues as they might see fit, and wherever their private interests should determine; and whether the streets were desired by the public or not, the private ownership would be displaced. Either one of two consequences must then follow: the public must be under some obligations to treat the land as constituting a street, and be subject to such liabilities as that fact would impose, or the land must remain waste property, in the hands of an owner who cannot use it for the purposes of profit, and who at the same time refuses to put it to the purposes contemplated in making the plat.

For this reason, a statutory dedication requires the same acceptance by the public as a dedication at common law.

As in a common-law dedication, before acceptance, an offer to dedicate may be withdrawn formally,[7] or informally by using "the property in a way that is

---

[7] An offer may be formally withdrawn by vacating the plat, *Gregory v Ann Arbor*, 127 Mich 454, 458; 86 NW 1013 (1901), or by formal resolution of a governmental body vacating the street, *Plumer v Johnston*, 63 Mich 165, 172; 29 NW 687 (1886), overruled on other grounds by *Loud*, 241 Mich at 456. See MCL 560.255b for the requirements for withdrawals by plat proprietors in a statutory dedication under the current platting statute, the Land Division Act (LDA), MCL 560.101 *et seq*.

inconsistent with public ownership."[8] If a platted roadway is never accepted, the public acquires no rights in the roadway, and "the owners of the lands fronting thereon, may again take possession of the property, and treat it as though, in all respects, no offer of dedication had ever been made." *Field*, 32 Mich at 281.

This overview of common-law and statutory dedications illuminates the principal similarities and differences between these modes of dedication. To create a public road at common law or by statute, there must be a clear intent on the part of the owner to dedicate, along with an acceptance by the public within a reasonable time. By either mode, "the question of dedication is one largely of intention . . . ." *Weihe v Macatawa Resort Co*, 198 Mich 334, 341; 164 NW 510 (1917). The difference is how the requisite intent—the *animus dedicandi* (the intent to dedicate)[9]—is made manifest. In a statutory dedication, "the intent of the owner is clear, and has been formally manifested in the plat recorded." *Rice*, 346 Mich at 664. By contrast, in a common-law dedication, the intent of the owner is implied from "all such acts connected with, or relating to the premises, tending to show the design and object of the dedication which is alleged . . . ." *Beaubien*, 2 Doug at 276. In this way, the intent to dedicate in a statutory dedication is easier to prove and the dedicator is estopped from denying the dedication by virtue of the requirement that the plat be recorded. Simply put, the landowner either did or did not properly record a plat and, if the former, is bound by this act. A clear and prescribed

[8] *Kraus*, 451 Mich at 431, citing *Lee*, 14 Mich at 18. Now, under the LDA, lands dedicated to public purposes in recorded subdivision plats are presumed by statute to be accepted, absent timely and proper withdrawal by the plat proprietor within 10 years after the plat is first recorded. MCL 560.255b; *Kraus*, 451 Mich at 426 n 2.

[9] See *Beaubien*, 2 Doug at 276.

method of evidencing intent is especially important in this area of the law, because other aspects of public dedication—namely, public acceptance and questions of withdrawal—are highly fact-specific.[10]

C. RIGHTS OF ABUTTING LANDOWNERS

The owner of property abutting upon a street "sustains a threefold relation to the street":

> 1. As one of the general public.
>
> 2. As owner of the reversionary interest to the center of the street.
>
> 3. As owner of a lot, possessed of the right of ingress and egress to and from the street. [*Detroit City R Co v Mills*, 85 Mich 634, 653; 48 NW 1007 (1891) (opinion by GRANT, J.).]

First, the abutting landowner "has the right, in common with every other member of the public, to the use of the street." *Id.* As *Mills* stated in this respect, "[f]ree passage is all the law gives him." *Id*. "A highway is a public passage for all," *Beaubien*, 2 Doug at 285, and thus every person—including the abutting landowner—is entitled to use public ways for travel.

However, in addition to right of public travel, other public uses may be implied from the dedication of land

---

[10] See *Alton v Meeuwenberg*, 108 Mich 629, 634-636; 66 NW 571 (1896), in which the Court included an illustrative excerpt of the fact-intensive jury instructions required to determine the intent of the parties with respect to a putative highway:

> "How did [the putative dedicator] act, at the time and afterwards? What use did he make of the lands, as showing an intent upon his part of dedicating the land? How was the land treated by the public authorities, with reference to its being a highway? Did they open a highway all along the line? Or what portion of it did they open? . . . These are questions for you to determine, from the evidence in the case; and, unless you believe, from the evidence, that they did, then that certain portion never became a public highway."

as a public way. For instance, in *Mills*, this Court considered whether the city of Detroit could authorize the construction of a new system of electric street cars on a city street. A plurality concluded that this use was implied by the dedication and did not impose a new burden on the abutting landowners. *Id*. at 654. "It may now be considered the well-settled rule that the streets of a city may be used for any purpose which is a necessary public one, and the abutting owner will not be entitled to a new compensation, in the absence of a statute giving it." *Id*. This "extension of the public rights in the streets" includes uses necessitated by "increased needs for heating, lighting, draining, sewerage, water, etc. . . . ." *Id*. at 653. The rationale for this rule is that

> [t]he dedication of land . . . must be understood as made and accepted with the expectation that it may be required for other public purposes than those of passage and travel merely, and that under the direction and control of the public authorities it is subject to be appropriated to all the uses to which village and city streets are usually devoted, as the wants or convenience of the people may render necessary or important[.] [*Warren v Grand Haven*, 30 Mich 24, 28 (1874) (holding that the municipality had the right to construct sewer lines beneath land dedicated for a public road).]

As this makes plain, the extension of public rights in the streets set forth in *Mills* has not been thought to be contrary in any way to the central principle of dedication, i.e., that the use of land dedicated to the public depends on the dedicator's intention and may not be appropriated to an entirely different use. See *White's Lessee*, 31 US at 438; *Weihe*, 198 Mich at 341. Rather, the rule in *Mills* is grounded on the premise that, in dedicating a street, the dedicator's intention was to

appropriate the land to all uses to which public streets are usually devoted, including all uses incidental to public travel.

Mills respects the municipality's "exclusive control" over a roadway in accordance with the use to which it was dedicated. *In re O'Brien*, 119 Mich 540, 541; 79 NW 1070 (1899). However, this Court's precedent also recognizes that

> "if a dedication is made for a specific or defined purpose, neither the legislature, a municipality or its successor, nor the general public has any power to use the property for any other purpose than the one designated, whether such use be public or private, and whether the dedication is a common-law or a statutory dedication[.]" [*Baldwin Manor, Inc v City of Birmingham*, 341 Mich 423, 430-431; 67 NW2d 812 (1954) (citation omitted).]

Following this fundamental proposition, this Court held in *Baldwin Manor* that the city was prohibited from putting a road across land dedicated for use as a park because that use was inconsistent with the purpose of the dedication. *Id*. at 434. Similarly, in *Village of Kalkaska v Shell Oil Co (After Remand)*, 433 Mich 348, 358; 446 NW2d 91 (1989), we held that the village's property interest in streets dedicated under the 1887 plat act did not include mineral rights because those rights were not necessary to the use and purpose for which the street was dedicated. Our caselaw is clear that a public entity's use of land dedicated to the public is limited to the purpose of the dedication. And in the case of a public road, "[w]hether the fee is nominally in county, city, or private owners, the public control is only in trust to secure to the public those rights of a public nature that exist in public ways of that kind." *Detroit v Detroit City R Co*, 76 Mich 421, 425; 43 NW 447 (1889).

Second, the abutting landowner possesses a reversionary interest to the center of the street. "It is elementary that upon the vacation of a street or alley the land reverts to the abutting owner or owners." *Mich Central R Co v Miller*, 172 Mich 201, 208; 137 NW 555 (1912). This rule applies to common-law and statutory dedications alike. As we have explained: "We see no reason to distinguish between the two types of dedication for the purposes of the law of abandonment. It is clear that the need for certainty of title exists equally in both instances." *Clark*, 334 Mich at 657. In a common-law dedication, unencumbered title to the property is restored in the abutting landowners when the street becomes free of the public easement. See 12 Michigan Civil Jurisprudence, Highways & Streets, § 224, p 260 ("Upon a vacation or abandonment of the street by the public, the fee of the abutting owners becomes free of the easement, which is thereby extinguished and terminated."). In a statutory dedication, title "vest[s] in the rightful proprietors of the lots, within the subdivision covered by the plat, abutting the street or alley." MCL 560.227a(1).[11] And while there are statutorily defined

[11] MCL 560.227a(1), governing the vesting of title upon vacation of plat, street, or alley, provides:

> Title to any part of the plat vacated by the court's judgment, other than a street or alley, shall vest in the rightful proprietor of that part. Title to a street or alley the full width of which is vacated by the court's judgment shall vest in the rightful proprietors of the lots, within the subdivision covered by the plat, abutting the street or alley. Title to a public highway or portion of a public highway that borders on, is adjacent to, or ends at a lake or the general course of a stream may vest in the state subject to [MCL 560.226].

MCL 560.226(2) specifies particular rules for discontinuing highways adjacent to a lake or stream, specifically requiring the circuit court to determine if vacating the plat "would result in a loss of public access," and, if so, to "allow the state and, if the subdivision is located in a township, the township to decide whether it wants to maintain the

mechanisms by which a road may be abandoned,[12] as well as particular procedures applicable to roads adjacent to a lake,[13] by either mode of dedication, and without regard to the road's location, title to a street that is vacated or abandoned vests in the owners of the lots abutting the street. MCL 560.227a(1); *Clark*, 334 Mich at 657.

This rule appears beyond reproach. In considering a predecessor of the current vacation statute, this Court explained in *Loud*, 241 Mich at 455, that "[t]he vacation statute . . . reveals legislative recognition of the propriety and justice of the rule that gives the owner of a lot bordering on a street or alley, opened or unopened, title to the center." See also *Patrick*, 120 Mich at 198, stating that the "plainest principles of justice require that the original holder's claim should be recognized." Indeed, in *In re Albers' Petition*, 113 Mich 640; 71 NW 1110 (1897), we held that the power of the courts to vacate a city street upon petition of the abutting land owners is not necessarily subject to the acquiescence of the city authorities. *Albers*, 113 Mich at 641, stated:

> Our understanding is that the city has no proprietary interest in the land, all of its authority over it growing out

---

property as an ingress and egress point." Accordingly, before a road commission abandons a road bordering a lake or stream, the Department of Natural Resources and Environment and the township in which the road is located may elect to maintain the road. If the township and the department decline to exercise their "priority to obtain the property or control of the property as an ingress and egress point," the property reverts to the abutting landowners. MCL 560.226(2); MCL 560.227a(1); see also MCL 224.18(5) and (8).

[12] Abandonment of a highway is subject to extensive statutory procedures and must be approved by the circuit court in the county where the road is located. See MCL 224.18; MCL 560.222; MCL 560.223; MCL 560.224a.

[13] See MCL 560.226, MCL 247.41, and n 11 of this opinion.

> of its legal duty to maintain the public ways, which are placed in its charge. Such interest in the land is in the abutting proprietors ordinarily . . . . [Citation omitted.]

Third, the abutting landowner's relationship to the street includes a right of access to his or her own property. This right is considered a natural easement and one of the incidents of ownership or occupancy of land. See *Kirchen*, 291 Mich at 108, in which we stated:

> The purchasers of lots in the original plat took not only the interest of the grantor in the land described in their respective deeds, but, as an incorporeal hereditament appurtenant to it, took an easement in the streets, parks and public grounds mentioned and designated in the plat as an implied covenant that subsequent purchasers should be entitled to the same rights. [Citation omitted.]

This "right of access" is considered a "private right" that flows from a deed that refers to a plat, and is distinct from the public's rights in the road. See *id.* (explaining that " '[t]he lot owners have a peculiar interest in the street which neither the local nor general public can pretend to claim; a private right in the nature of an incorporeal hereditament' ") (citation omitted). And it is well settled that this right of access constitutes a property right that adds value to the land. See *State Hwy Comm v Sandberg*, 383 Mich 144, 149; 174 NW2d 761 (1970) ("That right of access ordinarily attaches to property abutting a public highway and that this constitutes a property right is not disputed . . . and must be accepted as long having been the law in Michigan."); *Kirchen*, 291 Mich at 108 ("The grantors could not recall this easement and covenant any more than they could recall other parts of the consideration. They added materially to the value of every lot purchased.").

In summary, our caselaw has long recognized a landowner's multi-faceted relationship to a public

street abutting his property. This Court's decision in *Mills* not only provides insight into the nature of these rights, but also the extent to which Michigan courts have traditionally protected them. *Mills* appears to have been a difficult decision for the Court. The case was argued twice; the lead opinion was signed by only two justices; and the opinion issued over two lengthy and emphatic dissents, an unusual occurrence in an era in which there were relatively few separate opinions. One of the dissenters in *Mills* articulated the rights of the abutting owner slightly differently from the lead opinion, simply stating that an abutting owner "is entitled to every use which is not inconsistent with the public use . . . ." *Mills*, 85 Mich at 661-662 (MCGRATH, J., dissenting). Under either articulation of the landowner's legal rights, however, our precedent is clear that abutting owners "have special interests . . . which courts . . . are bound to respect." *Id.* at 670.

IV. ANALYSIS

With this legal background of the law of dedication, we may now turn to the central questions in this appeal: the nature of the property interest conveyed by the 1887 plat act, and how that property interest affects riparian rights.

A. PLAT ACT OF 1887

The North Charlevoix plat was properly recorded, the Charlevoix County Board of Supervisors accepted the dedication of streets in 1911, and the CCRC has continued to maintain the streets. It is undisputed that the elements of a statutory dedication of a public road were satisfied for the road at issue. The dedication is controlled by the plat act in effect at the time the plat was recorded, 1887 PA 309. Section 2 of that act provided, in relevant part:

> The map so made and recorded in compliance with the provisions of this act shall be deemed a sufficient conveyance *to vest the fee* of such parcels of land as may be therein designated for public uses in the city or village within the incorporate limits of which the land platted is included, or if not included within the limits of any incorporated city or village, then in the township within the limits of which it is included *in trust to and for the uses and purposes therein designated, and for no other use or purpose whatever*. [Emphasis added.]

The emphasized language is virtually identical to that of the first plat act of 1839, as well as to that of each successive platting statute until 1967. The 1967 statute, originally titled the Subdivision Control Act and now titled the Land Division Act, refers to the vested interest as a "fee simple" instead of a "fee," but is substantially similar in all other respects. MCL 560.253(1).[14]

The operative language makes clear that the statute conveys a "fee" that is expressly limited by the terms of the dedication. That is, the fee is held "in trust to and for the uses and purposes *therein designated*, and for *no other use or purpose whatever*." Accordingly, we first observe that the language used in the dedication of the plat is significant, indeed controlling, because no rights vest in the grantee beyond those that are "therein designed," and the land shall be used for "no other use or purpose whatever." Furthermore, we observe that, under this statute, a dedication is not presumed to be broad, requiring express words in the dedication to

[14] It has been suggested that the Legislature's use of "fee simple" to describe the county's interest in the 1967 plat statute, rather than "fee," as it used in all the predecessor statutes, is significant. While this may evidence some intention on the part of the drafters of the Land Division Act to emphasize the nature of the interest, the instant case does not require us to examine the significance of this difference. As discussed later, the language of the pre-1967 plat acts and the caselaw interpreting these statutes afford sufficient guidance.

limit its scope. Rather, in all its versions, the statute has taken the opposite approach. The scope of the dedication is strictly limited to the words expressly conveyed, i.e., the purposes "therein designated" and "no other use or purpose whatever." Finally, we note that the property interest conveyed by the statute is also limited in duration. Because the fee may be used for the purposes therein designated and for no other use or purpose whatever, duration is coterminous with continued use for the designated purpose.

There is further evidence from the plat act that the property interest conveyed by the statute is a "fee . . . in trust" that is limited in scope and duration. Early decisions of this Court shed light on the original understanding of this interest. In the first case in which we considered the platting statute, *People v Beaubien*, we described its purpose as follows:

> This statute, as is apparent on its face, was designed to provide an explicit mode for the dedication of streets and other grounds designed for public uses, upon the laying out of towns by individual proprietors, and to render the rights of purchasers, and the public generally, in grounds thus dedicated, definite and certain. It also obviated the difficulty met with in some of the cases in the application of common law principles of dedication, in regard to ownership of the fee, by providing that, upon compliance with the provisions of the act, this should vest in the county, in trust for the designed uses. [*Beaubien*, 2 Doug at 270.]

Beaubien was cited favorably several years later in *Wanzer*, in which the Court explained how a statutory dedication operates in conjunction with the rule that the government retains its interest only as long as it uses the road as a road. *Wanzer*, 3 Mich at 16, reiterated that the under the statute, the "fee . . . vest[s] in the county, in trust for the designed use" and then stated that when the governmental entity abandons the road,

"such discontinuance operate[s] to revest the fee in the original proprietor, or his grantee—in other words, . . . the property revert[s] . . . ."[15]

Then, in a series of cases dating from 1875-1899, this Court repeatedly considered the property interest conveyed by the platting statutes and further defined its nature. Arguably the most instructive articulation was by Justice COOLEY in *Miller*, 31 Mich at 448-49, in which he stated:

> It is not very clear what sort of title the act of 1839 designed to vest in the county, whether a fee simple, or only a conditional fee, or possibly a perpetual easement. There are some questions which suggest themselves here which we should be quite indisposed to encounter until it should become absolutely essential. Unquestionably the purpose was to vest in the county such a title as would enable the public authorities to devote the lands to all the public uses contemplated in making the plan, and to charge them with corresponding obligations when the title should vest. It is very clear that no purpose existed to give a title in the nature of a private ownership. This is all we deem it necessary to say on this point in the present case, and further questions must be dealt with when they arise.

Then, in *Bay Co v Bradley*, we explicitly posed a question that is central to the instant case. That is, "what is the position of the county as respects a strip of

---

[15] The dissent states that *Wanzer* "clearly concluded that a statutory dedication conveyed real, ordinary fee title." We respectfully believe that the dissent misreads *Wanzer.* The words "real, ordinary fee title" appear nowhere in that case, or in any other in which this Court has considered the property interest conveyed under a statutory dedication. Furthermore, nothing in *Wanzer*, or in any other case, supports the dissent's reading. Rather, from the start, this Court has interpreted the property interest conveyed by a statutory dedication in a manner consistent with the language of the early platting statutes as conveying a "fee . . . in trust to and for uses and purposes designated . . . ." See *Wanzer*, 3 Mich at 16; *Beaubien*, 2 Doug at 270. This is a particular and limited fee, not a "real, ordinary fee," if by that term the dissent means a common-law fee.

land dedicated to public use as a street under the statute?" *Bradley*, 39 Mich at 166. In clear and certain terms, the Court answered:

> [The county] acquires no beneficial ownership of the land, and exercises no volition about the transfer. Willing or unwilling, the law vests it with nominal title. It does not accept and cannot refuse. It cannot grant or otherwise dispose of the premises, and has no voice concerning the use. It is powerless to shorten the continuance of the easement, but other agencies may at any time bring it to an end, and in case of that the law does not allow even this figment of ownership to remain. In such event what was in the county vests in others. [*Id*. at 166.]

In another seminal plat act case, *Backus v Detroit*, the Court concluded that the city could build a wharf in the Detroit River at the end of a street dedicated in a plat governed by the platting statute. *Backus*, 49 Mich at 120.[16] Consistent with *Miller* and *Bradley*, *Backus* concluded that "[t]he purpose of the statute is not to give the county the usual rights of a proprietor, but to preclude questions which might arise respecting the public uses, other than those of mere passage . . . ." *Id*. at 115. Significantly, *Backus* declared that it "attach[ed] no special importance to the fact that the title passed instead of a mere easement" because the question of the city's right to construct a wharf did not depend on the nature of its property interest created by the plat act. *Id*. Rather, on the basis of the fundamental principle of the law of dedication, *Backus* concluded that the scope of the dedication controlled, asserting that "the city

[16] As discussed further below, *Backus* is the source of the rule in Michigan that a dedicated road that runs perpendicular to, and terminates at, the water conveys riparian rights to the receiving governmental entity. The rule from *Backus* governing perpendicular roads has always been considered distinct from the rule for roads parallel to the water. See *Thies*, 424 Mich at 295.

derives its authority from the dedication of the public way" and may not appropriate the end of the street "to any uses inconsistent with the dedication." *Id.* at 120. *Backus* determined that "the construction of a wharf which shall give the means of access from the highway by land to the highway by water, is not inconsistent with the gift." *Id*.

And finally, in *Patrick v Young Men's Christian Ass'n of Kalamazoo*, the Court once again addressed a dedication under a plat act and settled on this descriptive term of art for the property interest at issue: "A plat conforming to the statute . . . operates as a conveyance of a fee, though probably it is a *base fee*." *Patrick*, 120 Mich at 191 (emphasis added). *Patrick* subsequently explained there was "no apparent reason" for requiring the dedicator to completely part with his fee because "if the fee were conveyed, it would be but a *base fee*, determinable on the happening of a collateral event." *Id*. (emphasis added).

Thus, by the turn of the last century, this Court had provided ample direction on the nature of the property interest created by the early plat acts. Through a conveyance by a platting statute, the county does not receive "title in the nature of a private ownership," *Miller*, 31 Mich at 449; it "acquires no beneficial ownership of the land" and "has no voice concerning the use," *Bradley*, 39 Mich at 166; and it does not possess "the usual rights of a proprietor," but rather takes title only to the extent that it could "preclude questions which might arise respecting the public uses, other than those of mere passage . . . ." *Backus*, 49 Mich at 115. Simply put, "the law vests [the governmental entity] with *nominal* title." *Bradley*, 39 Mich at 166; see also *Detroit City R Co*, 76 Mich at 425 (reasoning that "whether the fee is *nominally* in county, city, or private

owners, the public control is only in trust to secure to the public those rights of a public nature that exist in public ways of that kind") (emphasis added).

We pause at this word "nominal" to emphasize the obvious, i.e., that the property interest conveyed by these early platting statutes is a fee *in name only*. The nomenclature used to describe this particular property interest in the state of Michigan for over a century has been a "base fee." *Patrick*, 120 Mich at 191; see also *Kirchen*, 291 Mich at 112 (stating that "the term 'base fee' which the court in [*Patrick*] said was probably meant by the statute, was used in the sense of a fee which has a qualification annexed to it"), citing 1 Bouvier's Law Dictionary (Rawle's 3d rev); *Village of Kalkaska*, 433 Mich at 351-352 (referring to the county's interest as a "base fee" since it is " 'debased because its duration depends upon collateral circumstances which qualify it' "), quoting Black's Law Dictionary (5th ed); *Jonkers v Summit Twp*, 278 Mich App 263, 278; 747 NW2d 901 (2008) (stating that "platted public roads convey either a mere public easement or, at most, a 'base fee' that amounts to little more than nominal title and no beneficial ownership whatsoever").[17]

[17] The dissent quotes further from Bouvier's Law Dictionary (Rawle's rev) a portion of the definition of "base fee" that *Kirchen* did *not* include, which states that "[t]he proprietor of such a fee has all the rights of the owner of a fee-simple until his estate is determined." We find the dissent's discovery significant, but for a different reason than the dissent does. The portions of this definition that *Kirchen* did, and did not, choose to include lends further support for the proposition that this Court has always viewed a statutory "base fee" as a property interest distinct from a common-law fee simple. That is precisely *why Kirchen* did not include the portion of the definition quoted by the dissent in its discussion. We are similarly unpersuaded by the dissent's reference to a definition of "base fee" in Black's Law Dictionary (8th ed), which, to the best of our knowledge, has never been cited by a court of this state in defining a

We find these interpretations of the property interest at issue to be faithful to the text of the 1887 plat act. As discussed, the text of the statute limits the interest conveyed in both scope and duration: the "fee . . . [is conveyed] in trust to and for the uses and purposes therein designated, and for no other use or purpose whatever." 1887 PA 309. This language evidences a legislative intent to *limit* the nature and extent of the government's interest to what was explicitly intended by the dedicator and to what was necessary to secure the parties' rights and responsibilities.

Thus, both the text and precedent support two inferences about the nature of the property interest conveyed under the 1887 act. First, the principal purpose at which the early plat acts was directed was "to render the rights of purchasers, and the public generally, . . . definite and certain" and to "obviate[] the difficulty met with in some" common-law dedications. *Beaubien*, 2 Doug at 270. As *Patrick* explained,

> [t]he statute in question provides in express terms that the plat shall have the effect to convey the fee of land dedicated to public uses to the county. . . . [There are] sufficient reasons for a statute which should give to a formal offer of dedication of public ground by a plat the effect of a conveyance by way of grant to uses, and providing a grantee. [*Patrick*, 120 Mich at 191.]

Second, just as it is clear that the statute was designed to render private and public property rights more certain than at common law, it is equally clear that the statute was *not* designed to expand the rights in dedi-

---

statutory "base fee" created in Michigan by the plat act of 1887, which conveys a "*fee . . . in trust to and for the uses and purposes therein designated, and for no other use or purpose whatever*." 1887 PA 309 (emphasis added). In summary, this Court has (a) never cited *these* definitions in describing a "base fee" in Michigan, and (b) has without exception articulated a specific *contrary* definition.

cated lands that the government had traditionally enjoyed at common law. On this point, our early caselaw is emphatic and unequivocal. *Miller*, 31 Mich at 449; *Bradley*, 39 Mich at 166; *Backus*, 49 Mich at 115; *Detroit City R Co*, 76 Mich at 425; *Patrick*, 120 Mich at 191.[18] These decisions make plain that, just as under common law, the government's relationship to land dedicated to the public is primarily defined by the obligations that flow from the gift. See *Miller*, 31 Mich at 450 (explaining that "there can be no conclusive presumption that a grant of land for a public way is [beneficial]"). Just as under common law, the government "acquires no beneficial ownership of the land," *Bradley*, 39 Mich at 166; nor does it possess "the usual rights of a proprietor," *Backus*, 49 Mich at 115.

B. RIPARIAN RIGHTS

Riparian rights are property rights. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 191-192; 521 NW2d 499 (1994). " 'Riparian land' is defined as a parcel of land which includes therein a part of or is bounded by a natural water course," *Thompson v Enz*, 379 Mich 667, 677; 154 NW2d 473 (1967), and the owners of such land enjoy certain exclusive rights, *Thies v Howland*, 424 Mich 282, 288; 380 NW2d 463 (1985). These rights include the right to erect and maintain docks, as well as to permanently anchor boats off the shore. *Id*.

---

[18] Because the dissent provides no contrary analysis of these cases, we simply do not understand how it justifies its assertion that "long-settled precedent established that a statutory 'base fee' is a fee ownership title capable of cutting off riparian rights . . . ." (Quotation marks omitted.) We do not understand which cases are the subject of this reference, because the cases cited above could not more forcefully and straightforwardly *define* and *limit* the rights conveyed in a statutory dedication to a governmental entity.

Generally, it is an "indispensable requisite" that riparian land actually touch the water. *Hilt v Weber*, 252 Mich 198, 218; 233 NW 159 (1930). Normally, "the interposition of a fee title between upland and water destroys riparian rights, or rather transfers them to the interposing owner." *Id*. However, the circumstances of this case illustrate an exception to this general rule. In *Croucher v Wooster*, 271 Mich 337; 260 NW 739 (1935), front-lot plaintiffs claimed riparian rights to a lake that was separated from their property by a highway. The highway was one "established by user." *Id*. at 339.[19] The Court surveyed foreign state authorities, including the New York case of *Johnson v Grenell*, 188 NY 407; 81 NE 161 (1907), and the Illinois case of *Illinois & Mich Canal Bd of Trustees v Haven*, 11 Ill 554 (1850), and asserted the following rule:

> [I]n the absence of an intention of the parties appearing to the contrary, the conveyance of a parcel of land bordering on a highway contiguous to a lake shore conveys the appurtenant riparian rights. [*Croucher*, 271 Mich at 344.][20]

Thus, *Croucher* held that the plaintiff front-lot owners, whose land was separated from the water by a public road, possessed riparian rights.

---

[19] Like a common-law dedication, a "highway by user" creates a public easement. *Eyde Bros Dev Co v Eaton Co Drain Comm'r*, 427 Mich 271, 282; 398 NW2d 297 (1986).

[20] *Croucher* thus recognized that a different result would obtain if the parties had evidenced an alternative intent, such as if a proprietor had reserved riparian rights. As Justice COOLEY explained in *Watson v Peters*, 26 Mich 508, 517-518 (1873):

> If, on the face of the plat, by reference to which the defendant bought, there was anything which distinctly indicated an intent on the part of the proprietors to make this case exceptional, and to reserve to themselves any rights in front of the water lots marked on it, after they should have been sold, the case would be different.

Consistent with this understanding, *Croucher* requires an express reservation by the plat proprietor in order for riparian rights not to attach to lots in the plat.

Croucher's rule should not be thought to be made up out of whole cloth. Rather, we know from a review of the rights of landowners abutting a public road that such landowners retained a possessory interest in the road that is recognized at common law and by statute. See *Clark*, 334 Mich at 657 (finding "no reason to distinguish between the 2 types of dedication for the purposes of the law of abandonment"); see also *Village of Kalkaska*, 433 Mich at 354-358 (concurring in the view that platting statutes convey "only the surface and so much of the subsurface as is necessary for street construction and municipal services") (citation and quotation marks omitted).

Between 1966 and 1976, *Croucher* was followed in four published Court of Appeals decisions. *Mich Central Park*, 2 Mich App at 197; *Sheridan*, 29 Mich App at 69-70; *Kempf*, 69 Mich App at 342; *McCardel*, 71 Mich App at 564-565. Whereas the road in *Croucher* was a "highway by user," the roads at issue in these cases were all statutorily dedicated under the 1887 plat act, the same act that applies in this case. The earliest of these cases, *Mich Central Park*, did not find this difference to be of any significance. Rather, it concluded that the holding that the front-lot owners had riparian rights was "squarely supported by *Croucher* . . . and the New York case of *Johnson* . . . cited therein," explaining: "In both of those cases, the lots involved were part of a plat: the road in the Michigan case had been established by user, while that in the New York case had been dedicated by the plat." *Mich Central Park*, 2 Mich App at 197-198. The Court of Appeals emphasized that "[t]he only exception" to this rule "is where there is land in private ownership lying between" the road and the waterway. *Id*. at 198.

When the Court of Appeals next considered the issue in *Sheridan*, 29 Mich App at 67, it framed the question

as whether the front-lot plaintiffs had riparian rights, "such rights being derived from the common law as judicially construed by the courts of this state." *Sheridan* answered that question affirmatively, stating that "[i]t is seemingly settled in Michigan that one whose property is separated from a navigable lake solely by a public street or highway has riparian rights in that lake." *Id*. at 70. *Kempf* also treated this rule as settled, emphasizing that "*Croucher* requires an *express limitation* to prevent riparian rights from attaching to lots abutting a waterfront highway." *Kempf*, 69 Mich App at 342. Finally, in *McCardel*, 71 Mich App at 564, the Court of Appeals posed the exact question that is presented in this case—"[w]ho owns the riparian rights" in property that is separated from a lake solely by a public street—and once again answered in favor of the front-lot plaintiffs. Furthermore, *McCardel* addressed the issue of the nature of the title conveyed to the county pursuant to the 1887 act:

> The defendants ask us to distinguish *Croucher* because the government in that case had only a highway easement, whereas Roscommon County is said to have a fee simple title to the boulevard property involved in this case under the terms of the plat act in effect when the subdivision plat was recorded. 1887 PA 309. Actually, that statute provided that the government would take a fee "in trust to and for the uses and purposes therein [the plat] designated, and for no other use or purpose whatever". Even if a distinction is possible we will not adopt it. There are problems with the *Croucher* rule, but an exception vesting the riparian rights in the public would create problems of its own—including the need to precisely define the underlying title in every case. *Croucher* at least offers uniformity, a more attractive feature than any offered by the defendants' proposed distinction. [*Id*. at 564-565.]

We granted leave in *McCardel* and affirmed in part and vacated in part. *McCardel*, 404 Mich at 94. While

we did not disturb the ruling that the front-lot plaintiffs had riparian rights, we did redirect the focus of the case, explaining:

> Assuming, *arguendo*, that the plaintiffs own the riparian or littoral rights as an incident of front lot ownership, it does not follow necessarily that the public does not have the right to enter and leave the water from the boulevard. The question to which the parties have devoted most of their attention in this litigation (ownership of the riparian or littoral rights) is, again, not dispositive. The question whether the public has the right to enter and leave the water from the boulevard, like the question whether they may lounge and picnic on the boulevard, depends, rather, on the scope of the dedication. [*Id*. at 97.]

With the benefit of *McCardel*, we again addressed a riparian dispute involving front-lot owners in *Thies*. *Thies* concerned a privately platted walk running parallel to the shore. Although the back-lot defendants argued that the case should be distinguished from *Croucher* because of this fact, we disagreed. Citing *Croucher* and its progeny approvingly, *Thies* explained:

> The cases which have applied *Croucher* only involved ways dedicated to public use. [Citing, among other cases, *McCardel*, 71 Mich App at 560; *Kempf*, 69 Mich App at 339; *Sheridan*, 29 Mich App at 64; *Michigan Central Park*, 2 Mich App at 192.] Nevertheless, we believe that *Croucher* is equally applicable to ways dedicated to the private use of a finite number of persons. [*Thies*, 424 Mich at 290.]

Thies then stated that the question of who owns the appurtenant riparian rights as between "the plattors, the 'front lot' owners, or the persons to whom the way is dedicated" was "settled in this state by *Croucher*," *id.* at 291, and reiterated *Croucher*'s holding:

> Unless a contrary intention appears, owners of land abutting any right of way which is contiguous to the water are presumed to own the fee in the entire way,

> subject to the easement. Since the owner's property is deemed to run to the water, it is riparian property. [*Id*. at 293.]

Consistent with *McCardel*'s focus on the scope of the dedication, the analysis in *Thies* did not end here. Citing *McCardel*, *Thies* stated:

> Even if we conclude that defendants merely have an easement interest in the walk and alleys, they may still prevail. Plaintiffs cannot prevent defendants from erecting a dock or permanently anchoring their boats if these activities are within the scope of the plat's dedication, and do not unreasonably interfere with plaintiff's use and enjoyment of their property. The ownership of the walk and alleys and the scope of the dedication of these lands are interrelated, but distinct inquiries. [*Id*. at 289 (citation omitted).]

In summary, Michigan's jurisprudence governing the riparian rights of front-lot owners provides several constant and guiding principles. First, front-lot owners whose property is separated by a public road running parallel to the water are deemed to have riparian rights, "such rights being derived from the common law as judicially construed by the courts of this state." *Sheridan*, 29 Mich App at 67; see also *Croucher*, 271 Mich at 345; *Thies*, 424 Mich at 291-293; *Mich Central Park*, 2 Mich App at 197; *Kempf*, 69 Mich App at 341-342; *McCardel*, 71 Mich App at 564-565; *Jonkers*, 278 Mich App at 269. Second, "[t]he ownership of the walk and alleys and the scope of the dedication of these lands are interrelated, but distinct inquiries." *Thies*, 424 Mich at 289. As we have seen throughout our law, all cases involving the public dedication of land "must be considered with reference to the use for which they are made . . . ." *White's Lessee*, 31 US at 438.

C. STARE DECISIS

In approaching any case, "[*s*]*tare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v Tenn*, 501 US 808, 827; 111 S Ct 2597; 115 L Ed 2d 720 (1991). However, if there is any realm within which the values served by stare decisis—stability, predictability, and continuity—must be most certainly maintained, it must be within the realm of property law. For this reason, "[t]his Court has previously declared that stare decisis is to be strictly observed where past decisions establish 'rules of property' that induce extensive reliance." *Bott v Natural Resources Comm*, 415 Mich 45, 77-78; 327 NW2d 838 (1982), citing *Lewis v Sheldon*, 103 Mich 102; 61 NW 269 (1894); *Hilt*, 252 Mich at 198. As we explained in *Bott*:

> The justification for this rule is not to be found in rigid fidelity to precedent, but conscience. The judiciary must accept responsibility for its actions. Judicial "rules of property" create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital. [*Bott*, 415 Mich at 78.]

We need not expound on this principle, but we nonetheless remain mindful of the respect due to judicial rules of property as we decide this case.

D. APPLICATION

We now turn to the lower courts' ruling that plaintiffs are not deemed riparian under Michigan law. Specifically, the Court of Appeals concluded that because "the 1887 plat act vests in the public a fee title

interest," plaintiffs did not have riparian rights. *Baum*, 284 Mich App at 559. That court further concluded that "the language of the dedication in no way limits what type of use may occur on the depicted streets or alleys or who may use them." *Id*. at 562. As we believe is now quite evident, the law of this state leads inexorably to the opposite conclusions.

The lower courts' fundamental error was in their understanding of the property interest conveyed to the CCRC by the 1887 plat act. We are not left to analogy or intimation in ascertaining the law of this state governing the nature of this interest. The statute and our precedents dating back well over a century tell us all we need to know to decide this case. We know that the "fee" conveyed by the statute is held "in trust to and for the uses and purposes therein designated, and for no other use or purpose whatever." 1887 PA 309. We know this fee conveys only "nominal title." *Bradley*, 39 Mich at 166. We know that the statute does not convey "title in the nature of a private ownership." *Miller*, 31 Mich at 449. We know that the CCRC was not conveyed any rights that were not necessary to the use and purpose for which the street was dedicated. *Kalkaska*, 433 Mich at 348; *Baldwin Manor*, 341 Mich at 430-431. And we know that the nomenclature to describe this interest is a "base fee." See, e.g., *Patrick*, 120 Mich at 191. *No* Michigan decision has ever held that a dedication of a parallel road conveys riparian rights to the receiving governmental entity,[21] and *every* Michigan decision that

[21] If such a case existed, it would certainly offer support for the dissent's position. However, neither our research nor that of the parties and amici curiae—nor that of the dissent—has identified such a case. Given the history of the statute at issue, as well as the frequency with which this Court once considered disputes regarding statutory dedications, we find the absence of any authority for the proposition that a "base fee" conveys riparian rights to be highly significant.

has addressed this exact issue has held that a dedication of a parallel road does *not* divest front-lot owners of riparian rights.

Conspicuously absent from the lower courts' decisions is any significant discussion of the cases cited above, including this Court's seminal cases interpreting the early platting statutes, such as *Miller, Bradley*, and *Backus*, and the Court of Appeals own *indistinguishable* decisions, *Mich Central Park*, *Sheridan*, *Kempf*, and *McCardel*. The "judicial rule of property" reaffirmed in this opinion is so engrained in property law that it is explicitly embodied in the Michigan Land Title Standards (5th ed), Comment B in Standard No. 24.5 ("A parcel of land separated from a natural watercourse by a highway or walkway, where the highway or walkway is contiguous to the watercourse, is riparian, unless a contrary intention appears in the chain of title."). This Court is not writing on a blank slate in this case, any more than was the Court of Appeals in *McCardel* when it held on identical facts that front-lot owners are deemed riparian; or was this Court in *Croucher*, 271 Mich at 344, when it offered that "the conveyance of a parcel of land bordering on a highway contiguous to a lake shore conveys the appurtenant riparian rights"; or was Justice COOLEY in *Miller*, 31 Mich at 449, when he stated that the early plat acts do not convey "title in the nature of a private ownership." The law of dedication is deeply rooted in the legal traditions, and in the caselaw, of this State.[22]

---

[22] Because the dissent "decline[s] to address whether the [majority's] misreading . . . should be upheld today," while also recognizing that "this may be one of those cases in which the incorrect but, apparently, extensively relied-upon rule . . . should be allowed to stand [as a matter of stare decisis]," we do not understand why the dissent characterizes itself as a "dissent," when, based upon some actual resolution of these matters, it might just as well turn out to be a "concurrence."

E. RESPONSES TO DEFENDANT

For the benefit of the bench and bar, and the parties, we will briefly consider the principal arguments of the parties, none of which, in our judgment, is sufficient to overcome the clear and longstanding law of this state. First, defendant contends, and the lower courts agreed, that the 1887 plat act "plainly" and "unambiguously" conveyed to the county a "fee" title to Beach Drive. As the trial court reasoned: "The conveyance of the fee for the Beach Drive property to the public is significant. . . . Because [plaintiffs] do not hold fee title to the waterfront land in front of their respective lots, they do not possess riparian rights." The lower courts were, of course, correct that the statute conveys a "fee." The lower courts were also correct that our goal when interpreting a statute is "to ascertain and give effect to the intent of the Legislature" as reflected in the language of the statute, and if such language is "clear and unambiguous," we need go no further. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). However, our duty in construing a statute requires us to consider the "meaning of the critical word or phrase *as well as* 'its placement and purpose in the statutory scheme.' " *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (emphasis added), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). That is, all words and phrases must be considered in statutory *context*. The 1887 plat act does not convey a "fee," period. Rather, it conveyed a "fee . . . in trust to and for the uses and purposes therein designated, and for no other use or purpose whatever." By the statute's terms, *this* "fee," this particular fee, which is strictly limited in scope and duration, bears little relation to a common-law fee, which is "the broadest property interest allowed by law . . . ." Black's Law

Dictionary (8th ed). And, as discussed, our caselaw provides ample guidance on the nature of this particular property interest—this "base fee"—as well as its purpose in the statutory scheme. The early plat acts were not designed to expand the rights that the government had traditionally enjoyed at common law in dedicated lands, see, e.g., *Miller*, 31 Mich at 449; rather, they were designed to render private and public property rights more certain than at common law, see, e.g., *Beaubien*, 2 Doug at 270; *Wanzer*, 3 Mich at 16.

Accordingly, when we apply the fundamental riparian doctrine by which "the interposition of a fee title between upland and water destroys riparian rights," *Hilt*, 252 Mich at 218, with the correct understanding of this fee interest, we reach a different conclusion than the lower courts did. We find it quite clear that a statutory "base fee" is *not* the type of "fee title" capable of "destroy[ing] riparian rights." *Id.* The "fee title" capable of destroying riparian rights is a common-law fee title, a distinct property interest.[23] Again, we need not speculate about this conclusion because our precedent unequivocally dictates that the statute did not convey "title in the nature of a private ownership." *Miller*, 31 Mich at 449. That is, it did not convey title in the nature of a common-law fee. Recognizing this distinction, the first decision of the Court of Appeals to address the precise issue before us properly applied the riparian doctrine when it stated that "[t]he only exception" to the rule deeming front-lot owners riparian "is where there is land in private ownership lying between" the road and the waterway. *Mich Central Park*, 2 Mich

[23] This appears to be the crux of our disagreement with the dissent. While we agree with the proposition that a common-law fee title cuts off riparian rights, we see a clear distinction between a common-law fee and a statutory "base fee," as that interest has long been defined in Michigan.

App at 198.[24] By failing to give proper weight to context and purpose, and by failing to fully consider precedents, the lower courts misconstrued the "fee" interest conveyed to the CCRC under the 1887 plat act when they held that this particular property interest was capable of divesting front-lot owners of their riparian rights.

Second, defendant criticizes decisions of the Court of Appeals that have deemed front-lot plaintiffs riparian in the instant circumstances, arguing that the Court in *McCardel* misread and erroneously relied on *Croucher* because *Croucher* concerned an easement created by a highway by user and *McCardel*, like the instant case, concerned a "fee" created by a statutory dedication. For reasons already discussed, we find *McCardel*'s decision that front-lot owners were riparian to be the only decision that the Court could have made that would have been faithful to the statute and consonant with Michigan's longstanding jurisprudence. We have found *no* authority on which the court in *McCardel* could have located riparian rights anywhere else than it did.

Furthermore, we do not think it necessary or helpful to focus on the distinction between an easement and a

---

[24] As discussed earlier, the other consideration in applying this rule is whether the plat proprietor has conveyed the lots "without reserve." *Turner*, 65 Mich at 462. In Michigan, such reservation is never presumed. As Justice COOLEY stated in *Watson*, 26 Mich at 517 (1873), when a proprietor "conveys with the water as a boundary, it will never be presumed that he reserves to himself proprietary rights in front of the land conveyed . . . ." In other words, an express reservation of rights is necessary. For this reason, the fact that plaintiffs' deeds do not contain specific language granting riparian rights is inconsequential. Under the law of this state, it would have taken an express reservation of rights by the proprietor to affect their riparian rights. No such reservation exists in plaintiffs' deeds, nor is there a suggestion of the existence of any such reservation in the chain of title.

fee, as defendant urges.[25] We need not frame the issue in this way because Michigan law is replete with decisions that define the *precise* property interest in dispute, and we see no grounds for redefining it. Furthermore, our discussion of the law of abandonment demonstrates that the distinction between an easement created by a common-law dedication and a base fee created by a statutory dedication has never been thought to be dispositive in this regard. By common law, upon aban-

[25] This is not to suggest, however, that a base fee and an easement are indistinguishable. Our survey of the law of dedication reveals several differences. First, when an easement is created by a common-law dedication, the fee in the soil remains in the proprietor. The same is not the case when the government holds a base fee. Second, because of the fact that the proprietor never parts with the fee when the government holds an easement, the owner of land abutting a public easement automatically takes free title when the road is abandoned and the easement is extinguished. By contrast, an owner of land that abuts a base fee holds a reversionary interest and takes title upon abandonment by prescribed and detailed statutory procedures. See, e.g., MCL 224.18. Third, and perhaps most importantly, our discussion of common-law and statutory dedications indicates that the rights of the receiving governmental entity in possession of a base fee are more secure and stable than those of an entity possessing a mere easement. This is because the intent to dedicate in a statutory dedication is clear and the dedicator is estopped from denying the dedication by virtue of the requirement that the plat be actually recorded. It may be difficult today to appreciate the significance of this, because disputes regarding public dedications are now relatively rare—largely, in our judgment, because of the constancy of our law in this realm since well before the previous century—but our early caselaw makes clear that this change in the common law was significant. *Beaubien*, 2 Doug at 270 (explaining that the plat act "obviated the difficulty met with in some" common-law dedications); *Patrick*, 120 Mich at 191 (stating that there are "sufficient reasons for a statute which should give to a formal offer of dedication of public ground by a plat the effect of a conveyance by way of grant to uses"). In sum, a base fee describes a property interest that is relatively secure and stable and that gives a governmental body using the base fee in a manner consistent with its scope full control over the estate. By contrast, a public easement created by a common-law dedication was perceived as a more vulnerable property interest open to challenge, which rendered the rights of purchasers and the public somewhat less certain.

donment, the title of the abutting landowner, who owns the soil in the land under a public road, is freed of the easement. By statute, upon abandonment, title "vest[s] in the rightful proprietors of the lots, within the subdivision covered by the plat, abutting the street or alley." MCL 560.227a. In light of these principles, to decide that front-lot plaintiffs are not to be deemed riparian because they do not own the *soil*, as they would if the road were an easement, would be a distortion of well-established law recognizing that plaintiffs and similarly situated property owners have a multifaceted legal relationship to a public road that includes a specifically defined possessory interest. It is beyond dispute that Michigan courts "are bound to respect" these "special interests" in such roads. *Mills*, 85 Mich at 670 (MCGRATH, J., dissenting on other grounds).

On this point, we find relevant the words of Justice MCGRATH in *Mills*:

> "Of what does property practically consist, but of the incidents which the law has recognized as attached to the title or right of property? Is not the idea of property in or title to lands, apart from and stripped of all its incidents, a purely metaphysical abstraction, as immaterial and useless to the owner as 'the stuff that dreams are made of?' . . . Property does not consist merely of the right to the ultimate particles of matter of which it may be composed,—of which we know nothing,—but of those properties of matter which can be rendered manifest to our senses, and made to contribute to our wants or our enjoyments." [*Id*. at 667-668, quoting *Grand Rapids Booming Co v Jarvis*, 30 Mich 308, 320-321 (1874).]

The riparian rights that plaintiffs and similarly situated property owners enjoy in Michigan are an "incident[] which the law has recognized as attached to the title or right of property." *Id.* at 667. These rights are just as real as the soil under the street and, to these

citizens, at least as valuable. Accordingly, we find defendant's analysis of *Croucher* and *McCardel* to be unpersuasive. By failing to recognize that the rule of these cases is both correct and well settled, defendant's analysis would upset the altogether reasonable expectations of front-lot owners, title insurers, and prospective front-lot purchasers throughout the state.[26]

---

[26] Defendant posits two additional arguments in an attempt to undermine the authority of *McCardel* and *Croucher*. First, it argues that an 1850 Illinois case cited in *Croucher*, *Haven*, 11 Ill 554, suggests that *Croucher* would not have deemed front-lot plaintiffs riparian if the road had been dedicated by statute. As a threshold matter, it is unclear why we would focus on this out-of-state case when our *own* caselaw on this subject is more than adequate. Clearly, it better behooves us to look to the significant number of Michigan decisions from this era that illuminate the nature of a "base fee" in this state. Moreover, we are not convinced that defendant's understanding of the citation of *Haven* in *Croucher* is correct. In surveying the persuasive law on this issue, *Croucher* cited *Haven* as contradictory authority, explaining that *Haven* "was determined by the law of Illinois by which the fee of the land under a dedicated street is held to be in the municipal corporation. *Confessedly that would not be true in the instant case*." *Croucher*, 271 Mich at 344 (emphasis added).

Defendant contends that the emphasized language demonstrates that *Croucher* saw the distinction between an easement and a "fee" as determinative. This conclusion, however, is belied by the fact that *Croucher* also cited *Johnson*, 81 NE 161, a New York case that concerned a statutory dedication and in which the court deemed the front-lot owners riparian. It is further belied by a reasonable reading of the emphasized sentence. In this sentence, we think it more likely that *Croucher* was simply recognizing that the law in Michigan was well established by the time of its decision in 1935. That is, some states treat a statutory dedication as conveying a common-law fee title. But "[c]onfessedly that would not be true in the instant case," because Michigan does not. In Michigan, a statutory dedication creates a "base fee." For these reasons, we believe this Illinois case would constitute a shaky foundation on which to ground a critical rule of property in Michigan, and one that would not satisfactorily explain to citizens of this state why their reasonable expectations should be upset.

By the same token, we are not persuaded by defendant's reliance on MCR 7.215(C)(2) and (J)(1), governing the precedential effect of published Court of Appeals opinions under the rule of stare decisis, and do

Third, defendant contends that *Thies* somehow changed or even impliedly overruled the rule of *Croucher* and *McCardel*, under which front-lot plaintiffs are deemed riparian. When viewed in its entirety, we find it impossible to read *Thies* as overruling or in any way altering this rule. Rather, as seen throughout the opinion, *Thies* cited *Croucher* and its progeny, including *McCardel*, in a fully approving manner, and, indeed, extended the rule of *Croucher* to the facts before it, which involved a privately platted walkway. *Thies*, 424 Mich at 291-294. Defendant's interpretation of *Thies* focuses on its statement that "[t]he relevant inquiry is . . . whether the abutting landowner owns the fee in the way which separates his property from the water[.]" *Id*. at 290. Neither this sentence nor the treatise quotation that follows takes Michigan property law in any new direction. Rather, *Thies* was simply setting forth the uncontested riparian doctrine that "the interposition of a fee title between upland and water destroys riparian rights, or rather transfers them to the interposing owner." *Hilt*, 252 Mich at 218. There is no question that this is the *general* rule, and in

not think that this court rule provides an adequate explanation to these citizens. While the Court of Appeals may not have been bound to follow *McCardel* and other pre-1990 decisions, it was bound to follow *Miller*, 31 Mich at 449; *Bradley*, 39 Mich at 166; *Backus*, 49 Mich at 115; *Kirchen*, 291 Mich at 112; *Village of Kalkaska*, 433 Mich at 353-358; and *Jonkers*, 278 Mich App at 278, all of which held that a statutory base fee conveys only nominal title. Further, as we have emphasized, in the area of property law, important prudential considerations favored the Court of Appeals following its own pre-1990 precedents. That is, the longer a judicial rule of property has endured, and the more time has elapsed since its establishment, the greater the public's reliance. Under either the standard set forth in *Robinson v Detroit*, 462 Mich 439, 464-466; 613 NW2d 307 (2000), or the standard articulated by the Chief Justice in *Petersen v Magna Corp*, 484 Mich 300, 338-339; 773 NW2d 564 (2009) (opinion by KELLY, C.J.), these are highly relevant considerations in assessing the merits of stare decisis.

articulating this, *Thies* can hardly be said to have overruled the *exception* to the general rule that is involved in *Croucher* and its progeny, as well as in this case—that a statutory "base fee" constitutes a distinctive property interest, wholly distinct from a common law "fee title," that does not "transfer [riparian rights] to the interposing owner." *Id.* We do not see how this could have been communicated any more forcefully in *Thies* than by citing approvingly the critical authority on which this exception was grounded and extended. *Thies*, 424 Mich at 290-294, citing *Croucher*, *McCardel*, *Kempf*, *Sheridan Drive*, *Mich Central Park*, and *Johnson*.

Fourth, defendant argues, and the lower courts agreed, that the fact that plaintiffs' property is taxed as "water view" and not "waterfront" property is significant in the determination of whether the law of this state deems them riparian. We respectfully disagree. As a threshold matter, with the law presented to us, it is not clear why we would venture from our area of principal responsibility—interpreting the law—to decide this matter on the basis of practices that we may not fully understand and that have not been significantly briefed, such as the premises of a township's property tax assessment system. It is true that plaintiffs' properties are assessed as "water view" property and thus are taxed at a lower rate than properties assessed as "waterfront."[27] However, this distinction is likely based—we do not know for certain—on the traditional real estate proposition that property value is a function of "location, location, location." That is, while

[27] An assessor for defendant township provided an affidavit explaining that as "water view" property, plaintiffs' properties were assessed using a figure of $2,000 a front foot along Beach Drive. Had the properties been assessed as "waterfront" property, the front-foot assessment figure would have been $6,000.

plaintiffs' riparian rights certainly add value to their property, such property is likely to be *less* valuable than property that is spared a road separating it from the lake.[28] We do not think that plaintiffs' property tax assessment rate lends support, one way or the other, for the conclusion that they do not hold riparian rights.

We must address one last issue that was unanswered in the lower courts' decisions. That is, if the lower courts were correct that plaintiffs do not own the riparian rights to Beach Drive, *who does*? Neither lower court answered this question, an omission that would, if their decisions were left intact, introduce obvious uncertainty into the property law of this state and engender unnecessary litigation. Indirectly, however, the Court of Appeals intimated that the *county* owned such rights because, the Court concluded, the county was in "no way" limited to the type of use it may make of the road. *Baum*, 284 Mich App at 561. This conclusion is clearly erroneous and cannot stand. The first principle of the law of dedication is that all cases "must be considered with reference to the use for which they are made." *White's Lessee*, 31 US at 438. Accordingly, for over a century, this Court has consistently held that the scope of the dedication controls the resolution of this question. *Backus*, 49 Mich at 120; *Baldwin Manor*, 341 Mich at 430-431; *McCardel*, 404 Mich at 97; *Thies*, 424 Mich at 289. The CCRC simply cannot use the road for purposes not contemplated by the dedication itself, just as no public entity has ever been held to have " 'any power to use the property for any other purpose than the one designated . . . .' " *Baldwin Manor*, 341 Mich at 430 (citation omitted).

---

[28] As plaintiffs' counsel explained at oral argument: "[T]here is a road that goes between the platted front lot line and [plaintiffs'] riparian property, that makes that property less valuable to a third-party buyer than if no road were there."

Thus, the scope of the dedication is central to this case. The dedication includes the following language: "[T]he streets and alleys as shown on said plat are hereby dedicated to the use of the public." Read in context, the dedication grants to the public "use" that is consistent with the understood uses of "streets and alleys" at the time of the dedication. As a contemporary decision of this Court stated, "the public control [of the street] is only in trust to secure to the public those rights of a public nature that exist in public ways of that kind." *Detroit City R Co*, 76 Mich at 425. We are convinced that riparian rights were not among those "rights of a public nature" thought to "exist in public ways of [this] kind." *No* Michigan decision of that era, or any other, has held that a dedication of a road running parallel to the water conveys riparian rights.[29] Indeed, the CCRC itself never claimed to possess riparian rights until *after* the trial court's decision.[30] This conclusion is confirmed by the related, but converse,

---

[29] Despite this absence of authority, the dissent would substantially redefine the property interest at stake and conclude that a base fee cuts off the riparian rights of a private landowner and conveys such rights to the county.

[30] When the CCRC filed its counterclaim, it did not assert any claim to riparian rights. Rather, its counterclaim was directed at the alleged encroachments to its property interests. It was only after the trial court ruled that plaintiffs were not deemed riparian that the CCRC changed its position. Even so, its position has continued to evolve. In its brief in opposition to plaintiffs' motion for reconsideration, it argued:

> Just because the public, under current law, cannot fully use the water adjacent to its fee ownership does not mean that the riparian rights rest or remain with someone else. It just means that such rights are not fully exercisable by anyone associated with a particular parcel of property.

In its brief in this Court, the CCRC now claims that it is entitled to use the roadway to provide public access to the water and maintain a public dock for temporary mooring while coming to and from the lake, both of which activities are inherently riparian.

rule in Michigan by which "public ways which terminate at the edge of navigable waters *are* generally deemed to provide public access to the water." *Thies*, 424 Mich at 295. This rule distinguishing between parallel and perpendicular roads in this context derives from *Backus*, a decision contemporaneous with the plat act of 1887.[31] *Backus* expressly recognized that the scope of the dedication controls and thus determined that when a roadway terminates at the water "the plattor intended to give access to the water . . . ." *Id.* at 296, citing *Backus*, 49 Mich at 119-120. It is significant in the instant case that the plat proprietor's intent to give access to the water at the one road in the plat that terminates at the lake was further clarified by a depiction of a dock extending into the lake at the end of this road.

As a practical matter, the rule of *Backus* is as compelling today as it was in 1882. A road running parallel to the water is very different conceptually from a road that terminates at the water. The former may provide the public access to the water *consistently with* the primary purpose of a public roadway—"public passage for all." *Beaubien*, 2 Doug at 285. The latter cannot. It is an untenable to say that the CCRC could exercise riparian rights to Beach Drive, a paved road running parallel to the lake that undisputedly is used for year-round vehicular travel, consistently with the

[31] We further note that since 1895, the distinct rule applying to roadways terminating at the water has also been recognized by statute. MCL 67.35, the current of version of 1895 PA 3, provides in relevant part:

> The council of any village located upon or adjacent to any of the navigable waters of the state shall have the power to establish, construct, maintain, and control public wharves, docks, piers, landing places, and levees, upon any lands or property belonging to or under the control of the village, including property at the foot or end of public streets . . . .

understood purpose of the dedication of the streets in the plat, which is to provide "public passage for all." Accordingly, we come full circle to the precept with which we began: "This being a case to which the law of dedication applies, the use for which the dedication was made must determine the extent of the right parted with by the owner of the land and acquired by the public." *Patrick*, 120 Mich at 193. We hold that, contrary to the lower courts' rulings, the CCRC cannot exercise riparian rights to Beach Drive, including granting public access to the water, because such uses are incompatible with the underlying dedication.

V. CONCLUSION

The "fee" conveyed by the 1887 plat act is held "in trust to and for the uses and purposes therein designated, and for no other use or purpose whatsoever." 1887 PA 309. The particular property interest created by the statute, a "base fee," conveys to the receiving governmental entity only "nominal title." *Bradley*, 39 Mich at 166. A base fee in a public road running parallel to the water has never been thought to divest front-lot property owners of their riparian rights, much less convey riparian rights to the county. In the history of Michigan property law, *no* Michigan decision has ever suggested these propositions, and *every* Michigan decision that has addressed the exact issue before us has concluded as we do, that riparian rights rest with the front-lot owners. On the authority of our longstanding caselaw, and mindful of the particularly compelling mandates of stare decisis in the realm of property law, we hold that plaintiffs have riparian rights, as similarly situated persons have *always* had in this state. Accordingly, we reverse and remand the case to the trial court for proceedings not inconsistent with this opinion.

KELLY, C.J., and CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

DAVIS, J. (*dissenting*). I respectfully dissent, because I conclude that long-settled precedent establishes that a "statutory 'base fee' " is a fee ownership title capable of cutting off riparian rights and no precedent from this Court has established a contrary rule.

"At the common law, when the owner of land has laid it out into village lots, intersected with roads and public squares, such roads and squares are dedicated to the public use. But it is not the fee of the land which passes in such cases; the public have only an easement in the land, the fee itself for all other purposes remains in the owner." *Wanzer v Blanchard & Buckland*, 3 Mich 11, 16 (1853). However, under a *statutory* dedication pursuant to the 1887 plat act, ownership in fee actually passes to the county, and if all statutory requirements are complied with, "the title, having become vested in the county thereby, remains there still, unless such discontinuance operated to *revest the fee* in the original proprietor, or his grantee . . . ." *Id*. (emphasis added).

This Court has explained that the "statutory 'base fee' " conveyed by the plat act is "a fee which has a qualification annexed to it." *Kirchen v Remenga*, 291 Mich 94, 112; 288 NW 344 (1939). This is hardly a clarification, and even Justice COOLEY regarded it as unclear whether a statutory dedication conveyed rights that were more in the nature of a fee or an easement. *Wayne Co v Miller*, 31 Mich 447, 448-449 (1875).[1]

[1] A few years later, Justice COOLEY would explain that the interest passed *was* fee title, but that this was of "no special importance" because the governmental entity nevertheless held that title "only in trust for street purposes." *Backus v Detroit*, 49 Mich 110, 115; 13 NW 380 (1882). Of course, *Backus* is only of marginal relevance because the street at issue there terminated at a river; it did not run parallel to the river.

However, 22 years earlier, this Court had clearly concluded that a statutory dedication conveyed a real, ordinary fee title. See *Wanzer*, 3 Mich at 16. And 15 years later, this Court equally clearly concluded that a statutory dedication vested the fee of the dedicated land in the county. *Village of Grandville v Jenison*, 84 Mich 54, 65-66; 47 NW 600 (1890).[2] By the 1930s, it was settled that although a "base fee" carried with it conditions and limitations, it was not qualitatively a different *kind* of ownership interest. *Rathbun v Michigan*, 284 Mich 521, 534-536; 280 NW 35 (1938).

This Court's explanation in *Kirchen* that the term "base fee" was "used in the sense of a fee which has a qualification annexed to it" relied on 1 Bouvier's Law Dictionary (Rawle's 3d rev), p 329. *Kirchen*, 291 Mich at 112. The *rest* of the definition of "base fee" in Bouvier's Law Dictionary explains that the "qualification" to which it refers "must be determined whenever the annexed qualification requires" and that "[t]he proprietor of such a fee has all the rights of the owner of a fee-simple until his estate is determined." See 1 Bouvier's Law Dictionary (1897). In this context, "determination" is essentially a synonym for termination, or something coming to an end. See *id*. Therefore, *Kirchen* never held that a "base fee" is not a fee interest; quite the contrary, it held that it *is* a fee interest—just one that could be terminated pursuant to an attached restriction.

This is consistent with the definition of a "base fee" in Black's Law Dictionary (8th ed). Black's Law Dictionary

[2] *Village of Grandville* has been cited more recently for the proposition that a statutory road dedication does indeed vest actual fee title in the county, albeit to be held in trust. *Village of Kalkaska v Shell Oil Co (After Remand)*, 433 Mich 348, 354 n 11; 446 NW2d 91 (1989); *Little v Hirschman*, 469 Mich 553, 557 n 4; 677 NW2d 319 (2004).

treats "base fee" as a synonym for "fee simple determinable," meaning either "[a]n estate that will automatically end and revert to the grantor if some specified event occurs" or "an estate in fee simple subject to a special limitation." Black's Law Dictionary (8th ed), p 649. So the definitions relied on by *Kirchen* and present in Black's Law Dictionary both indicate that the actual estate held by the owner of a "statutory 'base fee' " is indistinguishable from that of a fee simple other than the possibility of the estate terminating at some point.

Riparian rights attach to land that actually touches water, but "interposition of a fee title between upland and water destroys riparian rights, or rather transfers them to the interposing owner." *Hilt v Weber*, 252 Mich 198, 218; 233 NW 159 (1930). Because a base fee *is* a fee title, interposition thereof between a property owner's lot and the edge of water will cut off the lot owner's riparian rights.[3]

This Court has seemingly held to the contrary, but a careful reading of that precedent reveals that this Court actually reached no such contrary conclusion. In *Croucher v Wooster*, 271 Mich 337; 260 NW 739 (1935), the plaintiffs claimed to own property between a road and Gull Lake. According to the plat map, the defendants' lots were separated from the edge of the lake only by the road, and, as with the lots in the instant case, the property descriptions terminated at the road. The plat map showed no property between the road and the water. This Court concluded that in the absence of an expressed contrary intent, if a lot was bounded by a

[3] Of course, the overriding consideration is always the intent of the plat proprietor, so if the lot is described as having riparian rights or touching the water, that is effectively a reservation of rights by the plat proprietor—specifically, a reservation of riparian rights for the lot. In the instant case, the lot descriptions in the plat very clearly did not extend to the water's edge.

road that itself was not separated from the water by any land, the owners of that lot possessed riparian rights in the water across the road from the lot.

Superficially, this *appears* to create a bright-line rule, and, indeed, panels of the Court of Appeals believed that it did. See *McCardel v Smolen*, 71 Mich App 560, 564-565; 250 NW2d 496 (1976), and the cases cited therein. But the Court of Appeals did not analyze *Croucher*; it simply concluded that *Croucher* had settled the issue. However, the roadway under discussion in *Croucher* had been established by user and apparently had already been in existence before the plat was created, so it was a common-law road and therefore an easement, not a "base fee" road created pursuant to the plat act.[4] *Croucher* distinguished an Illinois case in which the opposite result was reached because of a state law "by which the fee of the land under a dedicated street is held to be in the municipal corporation," establishing that the abutting lot did *not* extend under the road. *Croucher*, 271 Mich at 344, citing *Illinois & Michigan Canal Bd of Trustees v Haven*, 11 Ill 554 (1850). *Croucher* observed that "[c]onfessedly that would not be true in the instant case." *Croucher*, 271 Mich at 344. It is true in the case at bar.

This Court later explicitly clarified that the relevant inquiry is "whether the abutting landowner owns the fee in the way which separates his property from the water . . . ." *Thies v Howland*, 424 Mich 282, 290; 380 NW2d 463 (1985). If the roadway is an easement, the owners of land abutting it actually own the land under the easement in fee all the way to the water, so their property is riparian. In *Thies*, this Court explicitly held that the public way was an easement. *Id*. at 293. And in

[4] This would have been the situation for most public ways that predate the first plat act. See *Baker v Johnston*, 21 Mich 319, 340 (1870).

Croucher, it was clear from the context that the public way was an easement. So in both *Croucher* and *Thies*, the holdings that the property owners had riparian rights naturally resulted from the fact that no fee title interposed itself between the lots and the water.

It appears that in *McCardel* and the cases cited therein, the Court of Appeals simply assumed that *Croucher* had established a bright-line rule, when, in fact, it had not. It is undisputed that an easement is not fee ownership. And well-settled Michigan precedent establishes that a statutory "base fee" under the plat act *is* fee ownership.[5] Therefore, absent a contrary intent expressed by the plat proprietor, a public road created under the plat act will cut off the riparian rights of abutting landowners. *McCardel* and its predecessors were incorrectly decided.

Nonetheless, I recognize that there are cases in which the soundest and most pragmatic application of stare decisis would have this Court decline to overrule incorrectly decided precedent. This Court should, after all, consider such issues as the practical workability of the rule, the extent of reliance thereon, whether chaos or other harm would ensue from overruling it, and whether a change in facts, jurisprudence, or perspective has altered the rule's significance. See *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 854-855; 112 S Ct 2791; 120 L Ed 2d 674 (1992).

This may be one of those cases in which the incorrect but, apparently, extensively relied-upon rule from *McCardel* and its predecessors should be allowed to stand. It may be so notwithstanding the fact that the abutting property owners may not have

[5] In other words, as this Court has so often explained, when the Legislature used the word "fee," the Legislature meant exactly what it said.

been taxed for riparian property and may reap a windfall at the expense of the public's right of access to the water, even though plain statutory language indicates that those landowners should have no such rights. However, under the circumstances, I decline to address that possibility.

I state only that the *McCardel* line of cases from the Court of Appeals and the majority today misread the precedent of this Court. I decline to address whether the misreading of *Croucher* should be upheld today, because I am of the view that it is not possible to draw reliable conclusions about what the law should be without first understanding what the law is and how it came to be that way. From the majority's conclusion that a "statutory 'base fee' " is not true fee ownership, I respectfully dissent.

CAVANAGH and HATHAWAY, JJ., concurred with DAVIS, J.

PEOPLE v SMITH

Docket No. 140371. Argued October 6, 2010 (Calendar No. 11). Decided December 29, 2010.

A Jackson Circuit Court jury convicted David R. Smith of manslaughter, reckless driving, and witness intimidation in connection with an automobile collision. At sentencing, defendant objected to the scoring of the sentencing guidelines, arguing in part that his conviction of witness intimidation precluded scoring offense variable 19 (OV 19) (interference with the administration of justice), MCL 777.49, for the manslaughter conviction. The court, John McBain, J., disagreed and assessed points under OV 19 for defendant's threatening statements to a witness. The court sentenced defendant within the recommended minimum sentence range under the guidelines, and defendant appealed. The Court of Appeals, BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ., affirmed defendant's convictions in an unpublished opinion per curiam, issued November 19, 2009 (Docket No. 286479), but agreed with defendant that the trial court erred in scoring OV 19, holding that under *People v McGraw*, 484 Mich 120 (2009), offense variables may not be scored for conduct that occurred after the completion of the sentencing offense unless provided for in the particular offense variable and that MCL 777.49 does not expressly or specifically provide for consideration of such conduct. Because defendant's threatening statements were made after the manslaughter was completed, the trial court should have assessed zero points for OV 19, and resentencing was required because defendant's minimum sentence fell outside the corrected guidelines range. The Court of Appeals remanded for resentencing on the manslaughter conviction and for resentencing on the conviction of witness intimidation because of a question of the proportionality of that sentence. The Supreme Court denied defendant's application for leave to appeal, 485 Mich 1134 (2010), but granted the prosecution's application for leave to appeal, limited to consideration of whether points may be assessed under OV 19 for conduct that occurred after the sentencing offense was completed, 485 Mich 1133 (2010).

In an opinion by Justice YOUNG, joined by Justices CORRIGAN, MARKMAN, HATHAWAY, and DAVIS, the Supreme Court *held*:

McGraw held that offense variables must be scored giving consideration to the sentencing offense alone unless otherwise provided in the particular variable. The circumstances described in OV 19 expressly include events occurring after the completion of the sentencing offense. The aggravating factors detailed in OV 19 contemplate events that almost always occur after the charged offense has been completed. Moreover, the Legislature specifically required that a sentencing court score OV 19 for every category of felony. Interference with the administration of justice encompasses more than just the actual judicial process, and the process of the administration of justice is not commenced until an underlying crime has occurred. Thus, under the exception to the general rule set forth in *McGraw*, OV 19 may be scored for conduct that occurred after the sentencing offense was completed.

Reversed in part; sentence for manslaughter reinstated.

Justice CAVANAGH, joined by Chief Justice KELLY, dissenting, concluded that nothing in MCL 777.49 specifically or explicitly permits a sentencing court to use a transactional approach to scoring OV 19 and would instead apply the general rule of *McGraw* that offense variables are to be scored on the basis of the sentencing offense only.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 19 — SCORING OFFENSE VARIABLES — INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE.

Points may be assessed under offense variable 19, which pertains to interference with the administration of justice, for conduct that occurred after the sentencing offense was completed (MCL 777.49).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Henry C. Zavislak*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Law Office of John D. Roach, Jr., PLC (by *John D. Roach, Jr.*), for defendant.

Amici Curiae:

William J. Vailliencourt, Jr., for the Prosecuting Attorneys Association of Michigan.

Anne Yantus for the Criminal Defense Attorneys of Michigan.

YOUNG, J. The issue presented in this case is whether offense variable (OV) 19, MCL 777.49, may be scored for aggravating conduct that occurred after the sentencing offense was completed. In *People v McGraw*, this Court held that "[o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable."[1] Here, we hold that because the circumstances described in OV 19 expressly include events occurring after the completion of the sentencing offense, scoring OV 19 necessarily is not limited to consideration of the sentencing offense. Thus, under the exception to the general rule set forth in *McGraw*, the offense variable may be scored for conduct that occurred after the sentencing offense was completed. We reverse the judgment of the Court of Appeals in part and reinstate defendant's sentence for manslaughter.

FACTS AND PROCEDURAL HISTORY

This case stems from an automobile collision in Jackson County in June 2007. Defendant was driving his 1993 Cadillac with three passengers, including Nicole Wolfe, who sat in the front passenger seat. Wolfe testified that defendant drove recklessly and at a high rate of speed when he pulled into a lane of oncoming traffic as a green truck approached. When Wolfe screamed in fear, defendant indicated that the truck would pull off the road. Thomas Lantz, the driver of the green truck, observed defendant driving toward his truck at a high rate of speed. Lantz testified that he pulled over as far as he could, but was unable to move

[1] *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009).

completely off of the road because road construction precluded it. At the last moment, defendant swerved back into the proper lane, avoiding the collision with the truck.

After the near collision with Lantz's truck, defendant accelerated through the construction zone and crested a hill. A short distance away, the victim, Diane Sigers, sat in her compact automobile, attempting to make a left turn from a cross street. Wolfe testified that she could see the side of the victim's car and her head as defendant's car approached. Wolfe again screamed, telling defendant that the victim's car would not clear the road in time. Defendant assured her that the car would get out of his way, and further increased his speed. Wolfe remembered that defendant applied the brakes just before impact, but was too late to avoid colliding with Sigers at a high rate of speed. The forensic pathologist testified that the victim died within a few seconds after the collision because of the massive injuries she sustained.

Wolfe spent two days in the hospital, having suffered six fractured ribs, a ruptured spleen, and a bruised heart in the collision. After she was discharged from the hospital, defendant began contacting her via telephone. Defendant told Wolfe that she "shouldn't talk to anybody" because "there was no proof of anything" and that defendant "was innocent" as long as Wolfe remained quiet. Defendant told Wolfe that if he could not "take care of the problem," then he would "have somebody else do it for" him. As a result of such statements, Wolfe was initially reluctant to speak with the police. Eventually, Wolfe did speak with the police, relaying what she recalled from before the collision, as well as defendant's statements to Wolfe after she was released from the hospital.

A jury convicted defendant of manslaughter,[2] reckless driving,[3] and witness intimidation.[4] At sentencing, defense counsel made two objections to the scoring of the sentencing guidelines, including arguing that defendant's witness intimidation conviction precluded the scoring of OV 19 for the manslaughter conviction. The trial court rejected the argument, ruling that defendant's attempt to interfere with the administration of justice was a "separately cognizable consideration[] within the sentencing guidelines . . . ." The recommended minimum sentence range for defendant's manslaughter conviction was 50 to 125 months' imprisonment. Defendant was sentenced within the sentencing guidelines as a second-offense habitual offender[5] to 10 to 22 years for manslaughter, along with a concurrent sentence of 5 to 15 years for witness intimidation.[6]

In his appeal of right, defendant argued that scoring OV 19 in addition to his conviction for witness intimidation amounted to "doubly penalizing" defendant. In an unpublished opinion per curiam,[7] the Court of Appeals affirmed defendant's convictions but remanded for resentencing, relying on this Court's recently decided opinion in *McGraw*. After noting the rule of *McGraw* that offense variables may not be scored for conduct that occurred after the completion of the sentencing offense unless provided for in the particular variable, the Court of Appeals ruled that OV 19 "does

---

[2] MCL 750.321.

[3] MCL 257.626.

[4] MCL 750.122(7)(b).

[5] MCL 769.10.

[6] The sentence for witness intimidation was an upward departure. Defendant received time served for the reckless driving conviction.

[7] *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued November 19, 2009 (Docket No. 286479).

not expressly or specifically provide" for the consideration of conduct that occurred after the completion of the sentencing offense.[8] Because defendant's threatening statements to Wolfe were committed after the manslaughter was completed, the Court of Appeals held that defendant should have received zero points for OV 19. The Court of Appeals affirmed defendant's convictions but remanded for resentencing on the manslaughter conviction because defendant's minimum sentence fell outside the corrected guidelines range of 43 to 107 months' imprisonment.[9]

Both defendant and the prosecution sought leave to appeal in this Court. We denied defendant's application[10] and granted the prosecution leave to appeal, "limited to the issue whether points may be assessed pursuant to MCL 777.49 (OV 19) for conduct that occurs after the sentencing offense is completed."[11]

STANDARD OF REVIEW

The interpretation and application of the legislative sentencing guidelines, MCL 777.1 *et seq.*, involve legal questions that are reviewed de novo.[12]

ANALYSIS

The statutory provision for OV 19 can be found at MCL 777.49, which provides:

> Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services. Score

---

[8] *Id.* at 5.

[9] *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).

[10] *People v Smith*, 485 Mich 1134 (2010).

[11] *People v Smith*, 485 Mich 1133 (2010).

[12] *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

> offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offender by his or her conduct threatened the security of a penal institution or court ..... 25 points
>
> (b) The offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services ..... 15 points
>
> (c) The offender otherwise interfered with or attempted to interfere with the administration of justice ... 10 points
>
> (d) The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or threat of force .... 0 points

In *McGraw*, this Court held that "[o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable."[13] Therefore, we must consider whether OV 19 provides for the "consideration of conduct after completion of the sentencing offense."[14]

As an initial matter, we note that the sentencing guidelines categorize all felonies into one of six distinct offense categories: crimes against a person, crimes against property, crimes involving a controlled substance, crimes against public order, crimes against public trust, and crimes against public safety.[15] These six offense categories encompass a broad variety of crimes, ranging from kidnapping[16] to removing a shrub

---

[13] *McGraw*, 484 Mich at 133.

[14] *Id.* at 133-134.

[15] MCL 777.5.

[16] MCL 750.349. Kidnapping is categorized as a crime against a person. MCL 777.16q.

within a highway right of way without a permit in order to make a sign more visible.[17] The Legislature has also directed, *without exception*, that OV 19 be scored for each and every one of these offense categories.[18]

The aggravating factors considered in OV 19 contemplate events that almost always occur *after* the charged offense has been completed. For example, pursuant to MCL 777.49(a), 25 points are assessed under OV 19 for conduct that threatens "the security of a penal institution or court . . . ." It is axiomatic that every defendant charged with a felony must, at a minimum, enter a court in order to have his criminal charges resolved.[19] And while not every criminal defendant is required to confront a penal institution in consequence of his felonious activity, by the time a defendant encounters *either* a courthouse or a penal institution, the sentencing offense has *long* been completed. The express consideration of these events explicitly indicates that post-offense conduct may be considered when scoring OV 19.

The Criminal Defense Attorneys of Michigan argues as amicus curiae that a defendant may be properly assessed 25 points under OV 19, but only if the underlying sentencing offense *itself* threatened the security of a courthouse or penal institution, such as when the sentencing offense was committed while the defendant was in prison. However, nothing in the language of MCL 777.49(a) is limited to those instances in which the sentencing offense itself occurred within a court or penal institution. Moreover, as noted earlier, the Legislature has specifically commanded that OV 19 be scored for *every* category of felony. If the scoring of OV 19 were

---

[17] MCL 252.311. Unauthorized shrubbery removal in a highway right of way is categorized as a crime against property. MCL 777.12b.

[18] MCL 777.22.

[19] MCL 767.1.

limited to felonies that threatened the security of a court or penal institution, it would be unclear how the full force of OV 19 could ever be applied to crimes that do not, in and of themselves, threaten the security of a court or penal institution, such as operating a locomotive under the influence of alcohol and causing death,[20] arson of woods and prairies,[21] or entering a horse in a race under a false name.[22]

Additionally, OV 19 requires the assessment of 15 points if a defendant used force or the threat of force against another person or another person's property to interfere with "the administration of justice or the rendering of emergency services . . . ."[23] Ten points are assessed under OV 19 if the defendant interfered with the administration of justice, but did so without the use of force or a threat of force.[24] In *People v Barbee*,[25] this Court addressed the meaning of interference with the administration of justice within OV 19. In *Barbee*, the defendant gave a police officer a false name during a traffic stop. The defendant pleaded guilty of operating a motor vehicle while intoxicated, third offense.[26] Because the defendant gave the police a false name, the trial court assessed 10 points for OV 19. This Court upheld the scoring, rejecting the defendant's argument that OV 19 could *only* be scored when the defendant's conduct interfered with the judicial process. Rather, we concluded that interference with the administration of justice "encompasse[d] more than just the actual judi-

[20] MCL 462.353(6); MCL 777.14m.

[21] MCL 750.78; MCL 777.16c.

[22] MCL 750.332; MCL 777.16q.

[23] MCL 777.49(b).

[24] MCL 777.49(c).

[25] *People v Barbee*, 470 Mich 283; 681 NW2d 348 (2004).

[26] MCL 257.625.

cial process" and that the scoring of OV 19 was proper because the police "are an integral component in the administration of justice, regardless of whether they are operating directly pursuant to a court order."[27] The "administration of justice" process, including the "actual judicial process," is not commenced until an underlying crime has occurred, which invokes the process. Because OV 19 specifically provides for the "consideration of conduct after completion of the sentencing offense,"[28] conduct that occurred after an offense was completed may be considered when scoring the offense variable.

CONCLUSION

Because the circumstances described in OV 19 expressly include events occurring after a felony has been completed, the offense variable provides for the "consideration of conduct after completion of the sentencing offense."[29] Under the exception to the general rule set forth by this Court in *McGraw*, OV 19 may be scored for conduct that occurred after the sentencing offense was completed. We reverse the judgment of the Court of Appeals in part and reinstate defendant's sentence for manslaughter.

CORRIGAN, MARKMAN, HATHAWAY, and DAVIS, JJ., concurred with YOUNG, J.

CAVANAGH, J. (*dissenting*). I respectfully dissent because I disagree with the majority's conclusion that a sentencing court may employ a transactional approach to scoring offense variable (OV) 19, MCL 777.49, in the

[27] *Barbee*, 470 Mich at 288.

[28] *McGraw*, 484 Mich at 133-134.

[29] *Id*.

sentencing guidelines. Rather, I think that the general rule that "the appropriate offense variables are generally to be scored on the basis of the sentencing offense" applies to OV 19. *People v McGraw*, 484 Mich 120, 124; 771 NW2d 655 (2009) (quotation marks omitted). Accordingly, I would affirm the judgment of the Court of Appeals.

As the majority correctly recites, in *McGraw* this Court held that "[o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *Id.* at 133. The majority also correctly notes that we recognized a limited exception to this general rule. Specifically, we held that offense variables may be scored on the basis of conduct not related to the sentencing offense when an offense variable "*specifically* provide[s] otherwise." *Id.* at 125, 129, 135 (emphasis added; quotation marks omitted).

In *McGraw*, this Court considered a list of OVs that permit a transactional scoring approach. *Id.* at 125-126, quoting *People v Sargent*, 481 Mich 346, 349-350; 750 NW2d 161 (2008). For example, MCL 777.44(2)(a) states that "[t]he entire criminal transaction should be considered" when scoring OV 14, MCL 777.42(2)(a) provides that OV 12 applies to acts that occurred within 24 hours of the sentencing offense and have not resulted and will not result in separate convictions, MCL 777.43(2)(a) allows scoring of OV 13 using "all crimes within a 5-year period," MCL 777.46(2)(a) permits a court to add the "aggregate value of the property involved" when scoring OV 16, and MCL 777.38(1)(a) focuses on conduct "beyond the time necessary to commit the offense" when scoring OV 8. These examples illuminate the clarity with which the Legislature made its intent known in the sentencing guide-

lines. As this Court stated in *McGraw*, conduct not related to the sentencing offense may only be considered when the Legislature has *explicitly* stated that such conduct may be considered. *McGraw*, 484 Mich at 126.

Call me a strict constructionist if you must, but contrary to the majority's conclusion, nothing in OV 19 "specifically" or "explicitly" permits a transactional approach to scoring that OV. The Legislature has established that it is capable of clearly and specifically expressing its intent regarding when a sentencing court may consider transactional conduct, and it would have done so in drafting OV 19 if that was truly its intent. The lack of specificity regarding the application of a transactional approach to OV 19, combined with the fact that the conduct described in OV 19 could occur during the commission of a charged offense, indicates a legislative intent to only score OV 19 on the basis of offense-specific conduct.

The majority's reliance on MCL 777.22 to support its conclusion is equally unpersuasive. Although the majority is correct that, under MCL 777.22, OV 19 is generally applicable to all six offense categories, this does not discount the fact that a court may only score OV 19 when it is appropriate for the facts of a particular case. The Legislature provided a detailed and unambiguous explanation of when such scoring is appropriate, and a sentencing court is not permitted to ignore the statutory language of a specific OV statute and rely solely on the fact that a sentencing court is generally permitted to score a particular OV for a particular offense category under MCL 777.22. As summarized earlier, the Legislature has demonstrated that it is capable of expressly stating when a sentencing court may apply a transactional approach to scoring OVs.

Because the Legislature did not do so in MCL 777.49, I believe the general rule of applying an offense-specific approach to scoring OVs applies to OV 19.

Moreover, the majority erroneously extends *People v Barbee*, 470 Mich 283; 681 NW2d 348 (2004), beyond its holding to support its reasoning. *Barbee* did not directly consider whether OV 19 should be scored using conduct committed after the sentencing offense is complete. Rather, *Barbee* only addressed the meaning of the phrase "interference with the administration of justice" as it is used in OV 19.[1] Although I remain committed to the holding in *Barbee* that the phrase " 'administration of justice' " "encompasses more than just the actual judicial process," *id*. at 287-288, I disagree with the majority that the administration of justice "is not commenced until an underlying crime has occurred," *ante* at 202, to the extent that the majority means that a crime must be *complete* before the "administration of justice" can begin. Rather, I think that the "administration of justice" may begin simultaneously with the commission of a crime in some circumstances. For example, if the police arrive on the scene of an ongoing crime and the defendant begins shooting at the officers or otherwise prevents the officers from "administering justice" while still in the process of committing the underlying crime, the defendant is simultaneously committing the sentencing offense and interfering with the administration of justice. Similarly, a defendant interferes with the administration of justice anytime he or she threatens a witness, even if the defendant makes the threat before law enforcement is actively "adminis-

[1] Furthermore, *Barbee* is distinguishable from this case on its facts because the defendant in *Barbee* gave a false name *during* the traffic stop associated with the sentencing offense whereas here defendant did not threaten the witness until *days* after the criminal conduct that was the focus of the sentencing offense.

tering justice" because the defendant's act of threatening the witness has the potential to impede the administration of justice. Under this approach, a defendant who threatens a witness while committing a crime could have points assessed under OV 19 because the defendant interfered with the administration of justice while committing the sentencing offense. Thus, applying the offense-specific approach to scoring OV 19 would not result in as narrow an application as the majority implies because the conduct considered by OV 19 does not necessarily include conduct occurring after an offense has been completed.

Finally, applying an offense-specific approach to OV 19 would not leave defendant's crime of witness intimidation unpunished. As discussed in *McGraw*, a sentencing court may consider transactional conduct "when deciding what sentence to impose within the appropriate guidelines range and whether to depart from the guidelines recommendation." *McGraw*, 484 Mich at 129. Moreover, "the prosecution is always free to charge a defendant with multiple offenses if they exist, rather than a single offense." *Id.* at 130. Indeed, it is clear that the trial court and the prosecution made use of these valid alternatives in this case. First, while explaining its decision to sentence defendant at the top of the guidelines minimum sentence range for his manslaughter conviction, the trial court seemed to take defendant's crime of witness intimidation into consideration. The trial court noted that defendant had failed to take responsibility for his conduct and had threatened a witness in an attempt to avoid responsibility. Second, defendant was convicted of and sentenced for witness intimidation on the basis of the conduct that was the foundation for the trial court's decision to assess 15 points under OV 19.

Although defendant's conduct was deplorable, I believe the majority's holding erroneously permits a sentencing court to consider transactional conduct when scoring OV 19, contrary to the general rule explained in *McGraw*. Accordingly, I respectfully dissent.

KELLY, C.J., concurred with CAVANAGH, J.

KING v STATE OF MICHIGAN

Docket No. 140684. Argued October 19, 2010. Decided December 29, 2010.

Steven E. King brought an action in the Ingham Circuit Court to enjoin the state of Michigan, the Department of Labor and Economic Growth, and the Commissioner of the Office of Financial and Insurance Regulation from revoking his resident insurance producer license on the basis of a felony drunk-driving conviction from 2000. Plaintiff had disclosed this conviction in his 2004 license application, and defendants expressly acknowledged it in the letter that granted his license. However, in 2008, defendants sought to revoke the license on the grounds that changes to the Insurance Code, MCL 500.100 *et seq*., in 2002 required them to deny the license, that granting the application had been a mistake, and that the current provisions of the code required it to revoke the license. The court, Thomas L. Brown, J., granted summary disposition in plaintiff's favor, and the Court of Appeals, BANDSTRA, P.J., and SAWYER and OWENS, JJ., affirmed in an unpublished opinion issued January 21, 2010 (Docket No. 288290). The Supreme Court ordered and heard oral argument on whether to grant plaintiff's application or take other peremptory action. 486 Mich 1069 (2010).

In an opinion by Justice DAVIS, joined by Justice HATHAWAY, and an opinion by Justice CAVANAGH, joined by Chief Justice KELLY, the Supreme Court *held*:

The Insurance Code did not require defendants to deny plaintiff's application for a resident insurance producer license in 2004 because of his felony conviction and does not require them to revoke plaintiff's license now on the basis of that felony conviction.

Justice DAVIS, joined by Justice HATHAWAY, further stated in the lead opinion that when plaintiff applied for his license, MCL 500.1205(1)(b) provided that an application "shall not be approved" if the applicant had committed any act that was a ground for denial under MCL 500.1239. MCL 500.1239(1), however, provided that the commissioner "may" refuse to issue a license for a list of possible reasons, including an applicant's having been convicted of a felony, and MCL 500.205 required the commissioner

to make a judgment call when reviewing an application. Taken together, these provisions set forth a licensure procedure that required the commissioner to exercise judgment and did not require the commissioner to deny plaintiff's application. The commissioner's 2004 decision to the contrary is not entitled to deference because it was not longstanding, consistently applied, or correct. Furthermore, although the 2008 amendments of the Insurance Code require the commissioner to deny applications by convicted felons, these amendments apply prospectively, and they do not require the revocation of any existing licenses. Finally, the plain language of the current provisions in the Insurance Code allows the commissioner to pursue the revocation of plaintiff's license, but only if doing so is a reasonable exercise of discretion. Asserting that the commissioner is required to revoke plaintiff's license is, in itself, an abuse of discretion and not a reasonable exercise of discretion. The commissioner may not revoke a license on the basis of the erroneous belief that he must do so. Justice DAVIS would not address whether equity applies to this case.

Justice CAVANAGH, joined by Chief Justice KELLY further stated that he concurred in affirming the judgment of the Court of Appeals and also wrote separately to state his view that OFIS may not, absent additional cause, revoke plaintiff's license on the sole basis of his fully disclosed and waived felony conviction. He would hold that a governmental licensing agency is estopped from revoking a license solely on the basis of the same fully disclosed and accurate facts for which it had previously granted an express waiver if the licensee has reasonably relied to his detriment on the license.

Affirmed.

Justice YOUNG, joined by Justices CORRIGAN and MARKMAN, dissenting, would hold that the Insurance Code in 2004 mandated that OFIS reject plaintiff's application under MCL 500.1205, which specifically prohibits issuing an insurance producer license to a resident applicant who had been convicted of a felony. MCL 500.1205 controlled over the version of MCL 500.1239(1)(f) applicable in 2004, the apparently conflicting provision that gave the OFIS commissioner discretion to refuse to issue a license to a convicted felon. MCL 500.1205 deals exclusively with the licensing of Michigan residents, while MCL 500.1239(1)(f) also applies to nonresident applicants and primarily provides grounds for probation, suspension, revocation, or refusal to issue a license, and this interpretation resolves the apparent conflict between the provisions by according meaning to both. The Supreme Court gives effect to the words of a statute as chosen by the Legislature, and

because all the relevant provisions could be reconciled on the basis of their plain meaning and the overall structure of the Insurance Code, the statutory provisions are not ambiguous and are not open to judicial construction. Justice YOUNG further stated that, by coming to a contrary conclusion, the lead opinion's statutory construction failed to give effect to all of the words of the relevant statutory provisions. Further, since a court does not have the power to overcome this valid statutory mandate, the concurring opinion erred by employing equity to displace the result chosen by the Legislature. Because Michigan's system of government is based on the separation of powers, neither the Supreme Court nor the actions of OFIS administrators can displace what the Legislature requires.

INSURANCE — RESIDENT INSURANCE PRODUCER LICENSES — LICENSING OF CONVICTED FELONS.

The 2008 amendments of the Insurance Code that require the Commissioner of the Office of Financial and Insurance Regulation to deny applications for resident insurance producer licenses by convicted felons apply only prospectively and do not require the revocation of any existing licenses (MCL 500.1205; 500.1239[1][f]).

Kelley Cawthorne, PLLC (by *Frank J. Kelley*, *Dennis O. Cawthorne*, and *Steven D. Weyhing*), for plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Michael P. Farrell*, Assistant Attorney General, for defendants.

DAVIS, J. Defendants appeal a Court of Appeals judgment affirming the trial court's grant of summary disposition in favor of plaintiff, which enjoined defendants from revoking plaintiff's resident insurance producer[1] license. We affirm.

The issues in this case are (1) whether in 2004 the Commissioner of the Office of Financial and Insurance Services[2] was *required* by statute to deny plaintiff's

[1] A "resident insurance producer" is more commonly known as an insurance agent.

[2] This position was held by Linda Watters from April 2003 until October 2007, when Ken Ross was appointed.

application for a resident insurance producer license on the basis of plaintiff's fully disclosed prior felony conviction, (2) whether the commissioner is now *required* by statute to affirmatively revoke plaintiff's license on the basis of the same prior felony, and (3) whether the commissioner is now *permitted* to revoke plaintiff's license on the basis of the same prior felony. We answer all three questions in the negative.

I. FACTS AND PROCEEDINGS

In 2000, plaintiff was convicted of operating a motor vehicle under the influence of liquor (OUIL), a felony. MCL 257.625. In 2004, he applied to the Michigan Office of Financial and Insurance Services (OFIS)[3] for a resident insurance producer license. Plaintiff fully disclosed his conviction. Plaintiff applied for a waiver pursuant to 18 USC 1033.[4] The director of OFIS's licensing division sent plaintiff a letter that read in part:

> Please be apprised that pursuant to 18 U.S.C. Section 1033 and 1034, specifically Section 1033(3)(2), permission to engage in the business of insurance is hereby granted to you by the Commissioner of the Office of Financial and Insurance Services under this federal statute in response to your application for such waiver. OFIS reviewed your 3rd OUIL felony conviction.

---

[3] OFIS is now the Office of Financial and Insurance Regulation, but at most of the relevant times, including in the Court of Appeals, it was referred to as OFIS.

[4] This section provides, among other things, that a person

> who has been convicted of any criminal felony involving dishonesty or a breach of trust . . . may engage in the business of insurance or participate in such business if such person has the written consent of any insurance regulatory official authorized to regulate the insurer, which consent specifically refers to this subsection. [18 USC 1033(e).]

> Please note that it is highly recommended that this letter be safeguarded and kept together with your license as proof of this waiver under 18 U.S.C. 1033/1034 in case your record and/or ability to engage in the business of insurance is ever challenged by someone in the industry, state government, or federal government.

Thus, defendants unquestionably had been made aware of plaintiff's felony. The commissioner granted plaintiff's license.

Plaintiff then pursued a career as an insurance agent for a number of years. In the meantime, he has not been convicted of any other felonies or provided any new grounds for revocation of his license that we are aware of. In 2008, defendants began proceedings to revoke plaintiff's license, and plaintiff initiated the instant suit. The gravamen of defendants' argument is that a change to the Insurance Code in 2002 had *required* the commissioner to deny plaintiff's application, that failing to do so was a mistake, and that the current provisions of the Insurance Code require the commissioner to correct that mistake. The trial court ruled that even if the commissioner had made a mistake in granting plaintiff's license, equity precluded defendants from revoking it now, and the Court of Appeals affirmed.

II. STANDARD OF REVIEW

The trial court's decision on a motion for summary disposition is reviewed de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). This Court reviews de novo questions of statutory interpretation. *Id*. The trial court's exercise of its equitable authority is discretionary within the confines of equity jurisprudence and the facts of the particular case, *Youngs v West*, 317 Mich 538, 545; 27 NW2d 88 (1947), and this Court reviews a trial court's grant of injunctive relief

for an abuse of that discretion, *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). The trial court's findings of fact are reviewed for clear error. *Beason v Beason*, 435 Mich 791, 801-803; 460 NW2d 207 (1990), citing MCR 2.613(C).

III. THE INSURANCE CODE

A. INSURANCE CODE LICENSURE PROVISIONS IN 2004

Before 2002, the Insurance Code's licensure provisions had required applicants to have "good moral character." See former MCL 500.1204(4), as amended by 1986 PA 173. It remains the law today that no licensing agency may make a finding as to an applicant's moral character on the sole basis of a criminal conviction. MCL 338.42. It also remains the law that "[o]rders, decisions, findings, rulings, determinations, opinions, actions, and inactions of the commissioner in [the Insurance Code] shall be made or reached in the reasonable exercise of discretion." MCL 500.205.

The "good moral character" requirement in the Insurance Code's licensure provisions was replaced by 2001 PA 228. When plaintiff applied for his license, MCL 500.1205(1)(b) provided that an application "shall not be approved" if the applicant had "committed any act that is a ground for denial, suspension, or revocation under [MCL 500.1239]." While this seems mandatory when read in isolation, MCL 500.1239(1) provided that "the commissioner *may* place on probation, suspend, revoke, or refuse to issue" a license for a list of possible reasons, including an applicant's "having been convicted of a felony." MCL 500.1239(1)(f) (emphasis added). Consistent with MCL 500.205, the licensure requirement mandates that the commissioner make a discretionary judgment call when reviewing an applica-

tion and deny the application if he or she concludes—in the exercise of that discretion—that denial, suspension, or revocation would be appropriate.

In other words, 2001 PA 228 replaced the ambiguous judgment call of "good moral character" with a more rigorously defined judgment call that entailed consideration of enumerated scenarios under which adverse action *may* be found appropriate. When the applicable versions of MCL 500.1205, MCL 500.1239, and MCL 500.205 are read *together*, they set forth a licensure procedure that requires the commissioner to exercise judgment within a framework, rather than exercising judgment in a more nebulous environment. We reject defendants' contention that the Insurance Code in effect in 2004 *required* the commissioner to deny plaintiff's application. The Insurance Code did not, and the commissioner's exercise of discretion in granting plaintiff a license was therefore permissible.

We recognize that shortly before plaintiff applied for his license, the commissioner rendered a decision[5] concluding that 2001 PA 228 removed the discretion to permit felons to receive licenses. An agency's interpretation of a statute is entitled to deference, but generally only if that interpretation has been relied on for a long time, and in any event no such interpretation may overcome the plain meaning of the statute itself. *Ludington Serv Corp v Acting Ins Comm'r*, 444 Mich 481, 505 & n 35; 511 NW2d 661 (1994). Defendants acknowledge that this unpublished decision has not been extensively relied on or applied consistently, and our review of the record indicates that the opinion was not even widely circulated internally. Furthermore, it was clearly

[5] *Mazur v Office of Fin & Ins Servs*, issued May 14, 2004 (Docket No. 2003-1515).

not relied on when the commissioner considered plaintiff's application and granted his license. Finally, the decision was incorrect.

Therefore, we answer the first question, whether in 2004 the commissioner had been required by statute to deny plaintiff's application, in the negative.

B. INSURANCE CODE LICENSURE PROVISIONS IN 2008 AND TODAY

Subsequently, 2008 PA 422 and 2008 PA 423 amended MCL 500.1205 and MCL 500.1239. MCL 500.1205 now provides in relevant part that "[a]n application for a resident insurer [sic] producer license shall not be approved unless the commissioner finds that the individual . . . [h]as not committed any act listed in [MCL 500.1239(1)]." And MCL 500.1239(1)(f) provides that "the commissioner *shall* refuse to issue a license" for "[h]aving been convicted of a felony."

These two statutes are now consistent, and were a convicted felon to apply for an insurance producer license *today*, the commissioner *would* be required to deny it. Indeed, plaintiff concedes as much. But no language in these statutes rebuts the general rule of construction that changes to a statute should only apply prospectively. Even if we were to engage in a speculation that the amendment was intended to clarify the Legislature's prior intent, amendments may not be applied retrospectively if doing so would impair a vested right. *Brewer v A D Transp Express, Inc*, 486 Mich 50, 56-57; 782 NW2d 475 (2010). The fact that an applicant like plaintiff would necessarily be denied a license today does not automatically invalidate defendant's decision to exercise its discretion to grant him a license in 2004.

Although the current statutes require denial of a license, they do not require an existing license to be revoked. The first clause of MCL 500.1239(1) states in

full: "In addition to any other powers under this act, the commissioner may place on probation, suspend, or revoke an insurance producer's license or may levy a civil fine under [MCL 500.1244] or any combination of actions, and the commissioner shall refuse to issue a license under [MCL 500.1205 or 500.1206a], for any 1 or more of the following causes[.]" Denial is mandatory if any of a number of enumerated conditions is satisfied; however, *revocation* is still as discretionary as it was in 2004.

Therefore, we answer the second question, whether defendant is currently required by statute to revoke plaintiff's license, in the negative.

IV. REVOCATION

We observe initially that the plain language of the present Insurance Code gives the commissioner the discretion to pursue revocation of plaintiff's resident insurance producer license for a variety of possible reasons, including plaintiff's having been convicted of a felony. However, we emphasize that doing so must be a "reasonable exercise of discretion." MCL 500.205. Here, the gravamen of defendants' argument is that the commissioner is required to revoke plaintiff's license. This erroneous abdication of discretion is, in itself, an abuse of discretion. *People v Stafford*, 434 Mich 125, 134 n 4; 450 NW2d 559 (1990). Therefore, in this case, the commissioner cannot be said to be engaging in a "reasonable exercise of discretion."

With regard to this issue, we hold only that the commissioner may not revoke a license on the basis of the erroneous belief that he must do so when, in fact, he has discretion. Because this result is mandated by the plain terms of the Insurance Code, we make no pronouncement about whether equity applies here or what

effect it might have. On that limited basis, we therefore answer the third question, whether the commissioner is now permitted to revoke plaintiff's license, in the negative.

V. CONCLUSION

Plaintiff's license was properly granted by the commissioner in 2004. The Insurance Code does not require plaintiff's license to be revoked now. The commissioner could have exercised reasonable discretion and decided to pursue revocation of plaintiff's license; however, in this case, the commissioner necessarily abused that discretion by proceeding on the basis of an erroneous belief that he was *required* to revoke plaintiff's license.

For the reasons stated, we affirm the courts below.

HATHAWAY, J., concurred with DAVIS, J.

CAVANAGH, J. (*concurring*). I concur in affirming the judgment of the Court of Appeals, but write separately to express my view that the Office of Financial and Insurance Services (OFIS)[1] may not—in the absence of additional cause—revoke plaintiff's license solely on the basis of the fully disclosed and waived felony conviction known to OFIS when it issued plaintiff's license in 2004. I would additionally hold that a governmental licensing agency is estopped from revoking a license solely on the basis of the same fully disclosed and accurate facts for which it had previously granted an express waiver if the licensee has reasonably relied to his detriment on the license issued.

First, I note that the stark conflict between MCL 500.1205(1)(b) and MCL 500.1239 as it existed in 2004

[1] Now known as the Office of Financial and Insurance Regulation.

creates an ambiguity. Compare MCL 500.1205(1)(b) ("license shall not be approved") with the 2004 version of MCL 500.1239 ("the commissioner may . . . refuse to issue [a] . . . license"). One provision allows discretionary licensing of convicted felons; the other precludes all discretion. By even the narrowest definition of ambiguity, the statutory provisions at issue here are ambiguous because "one ['irreconcilably conflicts'] with another . . . ." *Petersen v Magna Corp*, 484 Mich 300, 311 & n 23; 773 NW2d 564 (2009), quoting *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004).[2]

Defendants argue that the mandatory-denial provision applies only to resident insurance producers, whereas the discretionary-denial provision would apply to nonresident insurance producers. Statutes, however, "must be construed to prevent absurd results . . . ." *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010) (quotation marks and citation omitted). An interpretation of a statute is absurd when "it is clearly inconsistent with the purposes and policies of the act in question." *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 128-129; 718 NW2d 784 (2006) (KELLY, J., dissenting). One of the main purposes animating our statutory insurance scheme is to protect Michigan citizens from unscrupulous insurers. See title of 1956 PA 218 ("An act . . . to provide for the protection of policyholders, claimants, and creditors of unsound or insolvent insurers . . . ."); *In re Certified Question*, 413 Mich 22, 38; 319 NW2d 320 (1982) ("The extensive regulation of the

[2] I continue to adhere to the definition of "ambiguity" expressed in Chief Justice KELLY's lead opinion in *Petersen*, 484 Mich at 329 (stating that ambiguity exists " 'when a statute is capable of being understood by reasonably well-informed persons in two or more different senses' ") (citation omitted). But because the statute at issue here is ambiguous under any standard, it is unnecessary to consider this issue further.

insurance industry provided for in [the Insurance Code] indicates a legislative purpose to protect policyholders."). It would indeed be an absurd result to conclude that the Legislature intended to allow discretionary licensing of out-of-state felons to sell insurance in Michigan while mandating that no licenses could be issued to resident felons. Such an intention would provide *less* protection to Michigan policyholders, in direct conflict with the purposes animating the Insurance Code. The state is much better equipped to exercise oversight of in-state insurance producers, to discipline them when necessary, and to bring them and their property within reach of the Michigan courts. I therefore decline to adopt an absurd interpretation of the licensing provisions in order to avoid a finding of ambiguity.

Second, I believe that equitable remedies may be available when a statute is ambiguous. See *Stokes v Millen Roofing Co*, 466 Mich 660, 672; 649 NW2d 371 (2002) (opinion by WEAVER, J.)

Third, a court may, in its sound discretion, grant equitable relief if no legal remedy is available or if an available remedy at law is doubtful or uncertain. See *Tkachik v Mandeville*, 487 Mich 38, 45; 790 NW2d 260 (2010), quoting *Powers v Fisher*, 279 Mich 442, 448; 272 NW 737 (1937); *Edsell v Briggs*, 20 Mich 429, 433 (1870). In the instant case, the only statutory remedy available to plaintiff after revocation is an administrative appeal to "determine the reasonableness of the commissioner's action." MCL 500.1239(2). Because defendants argue that they *must* revoke plaintiff's license, however, the only "reasonableness" determination to be made at such an appeal would be whether the commissioner reasonably concluded that plaintiff had a felony conviction. Because there is no question that the felony

conviction exists—as plaintiff fully disclosed—the licensing statutes provide him no meaningful remedy whatsoever.

Fourth, in certain cases, equitable estoppel may be an appropriate remedy where one party has changed its position in reasonable reliance on a governmental mistake. See, e.g., *Pittsfield Twp v Malcolm*, 375 Mich 135, 147-148; 134 NW2d 166 (1965) (estopping a municipality from enforcing its zoning regulations against a kennel owner who was erroneously issued a building permit after he had relied on the permit and built a kennel). There is no question here that plaintiff has reasonably relied on the license issued to develop a career and that revocation would cause plaintiff an extreme detriment.

I would thus hold that a governmental licensing agency is estopped from revoking a license solely on the basis of the same fully disclosed and accurate facts for which it had previously granted an express waiver if the licensee has reasonably relied to his detriment on the issued license. The language "fully disclosed and accurate" requires that the licensing agency have before it all the information necessary when making its decision to grant a waiver. The phrase "reasonably relied" is equally important. Contrary to the dissent's concerns, I cannot imagine a situation in which it would be reasonable for a child molester who was issued a daycare license or a dangerous felon who was issued a license to carry a firearm to rely on such a wrongfully issued license. The situation here is vastly different. First, all the materials available to the public at the time plaintiff applied for his license indicated that a waiver of felony convictions was possible.[3] Indeed, defendants informed

[3] The Court of Appeals noted (1) that the agency's interpretation of the licensing statute in *Mazur v Office of Fin & Ins Servs*, Case No. 03-384-L,

plaintiff that a waiver was possible. In addition, the waiver letter that OFIS sent to plaintiff expressly indicated that OFIS was fully aware of plaintiff's felony conviction when granting the waiver. Plaintiff had absolutely no reason to think that the waiver was not available or that it was improperly granted when he relied on the license issued to invest years of his life developing a career. Conversely, a convicted child molester or violent felon would have little reason to believe that he or she would be eligible for a daycare or firearms license.

A court's discretionary use of equity allows "complete justice" to be done. *Tkachik*, 487 Mich at 46 (quotation marks and citation omitted). Achieving "complete justice" necessarily requires a court to examine and balance competing interests. It is beyond cavil that the need to protect children from child molesters would outweigh any interest of a child molester in keeping an erroneously issued license and the need to protect society from dangerous felons would outweigh any interest the felon has in keeping such a license. Any arguments posited that the rule I would apply to this case could allow such absurd results is pure hyperbole.

Accordingly, I concur in affirming the judgment of the Court of Appeals.

KELLY, C.J., concurred with CAVANAGH, J.

YOUNG, J. (*dissenting*). This case requires this Court to interpret the relevant licensing provisions of the

---

Docket No. 2003-1515 (May 14, 2004), had not been published or communicated to the public in the form of a rule, new guideline, or OFIS letter or directive, (2) that the interpretation was never communicated internally at OFIS, and (3) that waivers of felony convictions remained possible following *Mazur*. *King v Michigan*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 2010 (Docket No. 288290), p 2.

amended Insurance Code, which preclude persons who have been convicted of a felony from receiving a resident insurance producer license, in the context of the entire Insurance Code. In this case, the Office of Financial and Insurance Services (OFIS)[1] failed to discharge its statutory duties and enforce relevant statutory mandates when it granted plaintiff an insurance license in 2004, despite plaintiff's previous conviction of a felony. The decision by OFIS to seek revocation of that license, while unfortunate for the improperly licensed plaintiff, is nonetheless proper because the original licensure was invalid. Governmental administrators, like those in OFIS, cannot act in derogation or contravention of their statutory authority when issuing licenses. Because the majority justices fail to render meaning to all relevant provisions of the Insurance Code by holding contrarily, and thereby exercise judicial power to avoid the application of a valid statute, I respectfully dissent.

I. ANALYSIS

A. STATUTORY ANALYSIS

This case requires that we interpret the Insurance Code—specifically MCL 500.1205 and MCL 500.1239—as it existed in 2004. When "interpreting statutory language, this Court's primary goal is to give effect to the Legislature's intent. If the Legislature has clearly expressed its intent in the language of a statute, that statute must be enforced as written, free of any 'contrary judicial gloss.' "[2]

---

[1] The Office of Financial and Insurance Services has since been reorganized and is now part of the Official of Financial and Insurance Regulation, one of the named defendants in this case.

[2] *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010), quoting *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003) (citation omitted).

MCL 500.1205 governs the licensing of insurance agents who reside in Michigan; in 2004, MCL 500.1205(1) provided, in relevant part:

> An application for a *resident* insurer [sic] producer license ***shall not be approved*** unless the commissioner finds that the individual meets all of the following:
>
> * * *
>
> (b) Has not committed any act that is a ground for denial, suspension, or revocation under [MCL 500.1239].[3]

In 2004, MCL 500.1239 provided, in relevant part:

> (1) In addition to any other powers under this act, the commissioner *may* place on probation, suspend, *revoke*, or refuse to issue an insurance producer's license or may levy a civil fine under [MCL 500.1244] or any combination of actions *for any 1 or more of the following causes*:
>
> * * *
>
> (f) *Having been convicted of a felony*.[4]

At its most basic level, this case turns on the answer to a single question: in 2004, did these provisions of the Insurance Code prohibit OFIS from issuing a resident insurance producer license to an applicant who had been convicted of a felony? Defendant OFIS argues that these provisions *required* OFIS to deny plaintiff a license because he had been convicted of a felony. Plaintiff argues, however, that these provisions, when read together, did not constitute a statutory mandate that required OFIS to deny plaintiff a license, and therefore OFIS is equitably estopped from revoking it now. Thus, the primary dispute here is whether OFIS

---

[3] Italics and bold added.

[4] Emphasis added.

was mandated by statute to reject plaintiff's application in 2004, or whether OFIS had discretion to approve or reject the application at that time. If defendants' statutory interpretation is correct and the Insurance Code mandated that OFIS not grant licenses to former felons, then there exists a clear statutory mandate that neither equity nor this Court can avoid. In that situation, OFIS must be allowed to retract the license that should not have been issued in the first place. For the reasons set forth below, I agree with defendants.

If MCL 500.1205(1)(b) is read in isolation, there is no question that OFIS cannot issue a license to a convicted felon. In effect, it provides that an application for a *resident* insurance producer license *shall not be approved unless* the commissioner finds that the individual *has not committed a felony*. Here, OFIS approved a license without making the requisite finding that plaintiff had not committed a felony. Indeed, the opposite is true: OFIS *knew* that plaintiff had in fact committed a felony, as plaintiff honestly disclosed and as OFIS recognized in the letter it sent to plaintiff when informing plaintiff that he was being granted a "waiver."

However, MCL 500.1205(1)(b) cannot be read in isolation, but must be interpreted in light of the language of MCL 500.1239(1)(f), to which it makes direct reference. By itself, MCL 500.1239(1)(f) permits the OFIS commissioner to refuse to issue a license when an applicant has a felony conviction, but it does not forbid OFIS to grant the license as MCL 500.1205 does.

The OFIS commissioner resolved the apparent conflict between MCL 500.1205 (no discretion) and MCL 500.1239 (some discretion) in favor of applying the "no discretion" standard of MCL 500.1205 because it is "more particular" and "particularly con-

cerned with establishing standards for licensure."[5] The commissioner's *Mazur* decision attempted to establish harmony between the two statutes by concluding that OFIS must exercise the discretion conferred by MCL 500.1239(1) in light of the standards conferred by MCL 500.1205(1)(b).

I would hold that OFIS correctly resolved the apparent conflict between MCL 500.1205 and MCL 500.1239 in the way that most closely adheres to the Legislature's stated intent.[6] In coming to this conclusion, it is necessary to consider the entire statutory structure of the licensing provisions in the Insurance Code. As noted, MCL 500.1205 governs the licensing of *resident* insurance producers for individuals who reside in Michigan. The Insurance Code also allows the licensing of *nonresident* insurance producers who are licensed in another state but transact business in Michigan, which is sepa-

---

[5] *Mazur v Office of Fin & Ins Servs*, Case No. 03-384-L, Docket No. 2003-1515 (May 14, 2004), p 3.

[6] *Mazur* is a nonbinding administrative decision. Nevertheless, when interpreting a statute that a governmental agency has the power to interpret and duty to enforce, this Court accords

> "respectful consideration" for the agency's statutory interpretation, and will provide "cogent reasons" for overruling an agency's interpretation. Furthermore, when the law is "doubtful or obscure," the agency's interpretation is an aid for discerning the Legislature's intent. However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue. [*In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), citing and quoting *Boyer-Campbell Co v Fry*, 271 Mich 282; 260 NW 165 (1935).]

Contrary to the standard cited in the lead opinion, see *ante* at 214, *Rovas* and *Boyer-Campbell* remain good law and therefore articulate the proper standard by which this Court reviews an administrative agency's interpretation of a statute. See generally *Rovas*, 482 Mich at 104-109.

rately governed by MCL 500.1206a.[7] MCL 500.1239 applies both to resident *and* nonresident insurance producers.

The Legislature has chosen to apply differing standards to resident and nonresident insurance producers. While MCL 500.1205 provides that a resident applicant "*shall not*" be licensed if he has committed an act described in MCL 500.1239, MCL 500.1206a(1) contrarily provides that "[*u*]*nless denied licensure under* [*MCL 500.1239*], a nonresident person *shall* receive a nonresident insurance producer license . . . ."[8] Thus, the Legislature specifically used discretionary language in MCL 500.1239 to permit the commissioner to determine, in his discretion, whether to "refuse to issue an insurance producer's license" to a *nonresident* applicant who has been convicted of a felony. At the same time, the Legislature *prohibited* such issuance to resident applicants by using mandatory language in MCL 500.1205.

This interpretation avoids rendering any language nugatory or mere surplusage.[9] In particular, it accords meaning both to MCL 500.1205 and MCL 500.1239. The primary purpose of MCL 500.1239 is to provide grounds for probation, suspension, revocation, *or* refusal to issue a license. Thus, under this interpretation, every word in MCL 500.1239 has meaning because its provisions cover when OFIS may take disciplinary action against a licensee and its provisions covering

[7] Individuals who receive *nonresident* insurance producer licenses are subject to separate requirements to obtain and maintain a license that are different from applicants from Michigan who receive resident insurance producer licenses. See, generally, MCL 500.1204e and MCL 500.1206a.

[8] Emphasis added.

[9] See *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001) (observing that this Court must "avoid a construction that would render any part of the statute surplusage or nugatory").

initial licensing clearly refer to nonresident applicants. MCL 500.1205, on the other hand, covers *solely* the initial licensing of resident agents, and it merely incorporates by reference the *requirements* of MCL 500.1239, *not* its discretionary standard. By according meaning to each of these statutory provisions, it becomes clear that the Legislature wished to provide *no discretion* to the commissioner when licensing individuals from Michigan, but allow the commissioner to retain *some* discretion in taking disciplinary action or in licensing a nonresident applicant. Therefore, the statutory scheme removes the discretion explicitly contemplated in MCL 500.1239 in the initial licensing phase for resident applicants, but does not render it nugatory for all purposes.

Further, this construction is in accord with the rule of statutory construction providing that where " 'a statute contains a general provision and a specific provision, the specific provision controls.' "[10] When read together, the mandatory standard of MCL 500.1205 controls over the discretionary standard of MCL 500.1239 because it is more specific: MCL 500.1205 exclusively addresses the *issuance* of resident insurance producer licenses, whereas MCL 500.1239 includes lan-

[10] *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002), quoting *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994); see also *People v Ellis*, 224 Mich App 752, 756; 569 NW2d 917 (1997) ("The specific statute is treated as an exception to the general one."). This Court has further explained that "[i]n order to determine which provision is truly more specific and, hence, controlling, we consider which provision applies to the more narrow realm of circumstances, and which to the more broad realm." *Miller v Allstate Ins Co*, 481 Mich 601, 613; 751 NW2d 463 (2008).

Of note, the applicable versions of both MCL 500.1205 and MCL 500.1239 became effective March 1, 2002, and therefore the rule of statutory interpretation that the latter enacted statute prevails in the face of a statutory conflict is inapposite in this case.

guage regarding probation, suspension, issuance of civil fines, revocation of insurance licenses, and issuance of nonresident licenses. Because it relates to discipline generally, MCL 500.1239 thus has a broader application that cannot displace the standard of MCL 500.1205, which is specific to licensing resident insurance producers. Similarly, this specific directive controls over the general provision in MCL 500.205 that OFIS must act within the reasonable exercise of its discretion when making decisions or reaching conclusions.[11]

The lead and concurring opinions fail to consider the entire structure of the Insurance Code when coming to their respective conclusions that the code allows a discretionary standard to be applied to nonresident applicants, and that the code is ambiguous. As the above analysis demonstrates, and contrary to the argument made by the concurring justice, these statutory provisions are reconcilable and thus certainly not ambiguous.[12] "Conflicting provisions of a statute must be read together to produce an harmonious whole and to reconcile any inconsistencies wherever possible."[13] A statute is not ambiguous simply because it is suscep-

---

[11] MCL 500.205 generally directs that "[o]rders, decisions, findings, rulings, determinations, opinions, actions, and inactions of the commissioner in this act shall be made or reached in the reasonable exercise of discretion." For the reasons stated in the text, I reject the lead opinion's representation of MCL 500.205 as trumping the limitations imposed by MCL 500.1205.

[12] The concurring justice merely notes the conflict in wording, but provides absolutely *no* attempt at statutory interpretation or reconciliation of the separate statutory provisions before declaring that the statutes "irreconcilably conflict[]" with each other. See *ante* at 218 (citation and quotation marks omitted). Nor does the concurring justice accord any significance to the fact that the code treats resident and nonresident applicants under separate standards, instead merely finding this Legislative choice "absurd."

[13] *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 416; 590 NW2d 293 (1999).

tible to more than one interpretation.[14] Such an inexact standard would simply leave too much legislative work product open to reinterpretation or unwarranted intervention by the judiciary, as this case illustrates. Under this opinion's analysis, every provision of the code—including both the mandatory standard of MCL 500.1205 and the discretionary standard of MCL 500.1239—is accorded its plain meaning, but only when done with the understanding that there are two types of insurance producers licensed in Michigan and the code treats them differently. The lead and concurring opinions simply do not account for this.

Moreover, plaintiff's contrary attempt to reconcile these statutory provisions is not convincing. Plaintiff chiefly argues that OFIS has the discretion to determine whether grounds exist to deny a license and thus may "find" that an applicant has not committed a felony for the purposes of licensing. However, the relevant factual inquiry that OFIS must undertake does not leave room for ambiguity: either an applicant has been convicted of a felony or he has not. If the applicant has been convicted of a felony, the commissioner can hardly be said to have the discretionary power to "find" that he has not been convicted of a felony. Indeed, a decision so out of accord with reality would clearly constitute obvious error requiring reversal.

Aside from failing to consider the entire structure and separate provisions of the Insurance Code, the lead opinion's statutory analysis does not otherwise withstand scrutiny. The lead opinion generally concludes that OFIS initially had broad discretion to render its licensing decision, but that the 2002 amendments to the Insurance Code replaced the "nebulous environment"

[14] See, e.g., *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004).

in which OFIS made its decisions with the current "framework" in which OFIS now makes its decisions.[15] This argument appears to be little more than judicial gloss masking as interpretation in derogation of this Court's stated duty to determine *the Legislature's* intent.[16]

The lead opinion fails to explain *how* the relevant statutory provisions are "read *together*,"[17] and *why*, when the various statutory provisions are read together, they should not be construed as having required OFIS to deny plaintiff's license.[18] Nor does the lead opinion employ or discuss any of the traditional canons of construction that guide this Court's interpretation of statutes. Instead, the majority justices simply and summarily reject defendants' argument, but support this conclusion with little else than their own ipse dixit.

Perhaps more egregious, the lead opinion's ultimate interpretation fails to accord meaning to *all* the words of the statute. In particular, the statement in MCL 500.1205 that the insurance license "*shall not* be approved" if the applicant has been convicted of a felony is rendered functionally without meaning by the lead

---

[15] *Ante* at 214.

[16] See *Wayne Co v Hathcock*, 471 Mich 445, 456; 684 NW2d 765 (2004) ("In interpreting this statutory language, this Court's primary goal is to give effect to the Legislature's intent. If the Legislature has clearly expressed its intent in the language of a statute, that statute must be enforced as written, free of any 'contrary judicial gloss.' ") (citation omitted); *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 119; 659 NW2d 597 (2003) ("The imposition of a contrary judicial gloss is inappropriate where the Legislature has clearly expressed its intentions in the words of the statute.").

[17] *Ante* at 214.

[18] The lead opinion similarly determines that the *Mazur* decision "was incorrect" with, literally, no explanation why. See *ante* at 215.

opinion's interpretation.[19] Nor do the majority justices who join either the lead or concurring opinions accord any significance to the fact that the code treats resident and nonresident applicants under separate standards, or address why this fact does not resolve the apparent conflict in the statutory provisions as discussed above. Moreover, the admonition of MCL 500.205 that OFIS must not abuse its discretion when making decisions can hardly be said to allow OFIS to make whatever determination it feels is reasonable under the circumstances given that the Legislature has instructed in MCL 500.1205(1) that OFIS "shall not" take certain action. Nevertheless, the majority justices read these general statements in such a way as to displace the more specific statutory provisions.

B. ANALYSIS OF THIS COURT'S PRIOR CASES

This Court has long held in cases involving similar licensing decisions that revocation procedures must be invoked if a license was granted in excess of an agency's statutory authority. As far back as the early twentieth century, this Court decided that a facially valid license that was nevertheless issued in violation of a statute should be revoked.[20] In *Gamble v Liquor Control Comm*, this Court reaffirmed that principle, stating that the proper question before a court in such cases is to determine whether the license was issued in violation of the relevant statute.[21] Having determined that it was, the Court held that the license should have been revoked.[22] In *Elliott v Liquor Control Comm*, having

[19] Emphasis added.

[20] See *George v Travis*, 185 Mich 597; 152 NW 207 (1915).

[21] 323 Mich 576, 579; 36 NW2d 297 (1949).

[22] *Id.* at 580. This case, like others at the time, held that a licensee has no vested or property interest in a license and that due process protec-

determined that granting the plaintiff a license in that case was "forbidden," the commission was "required to revoke, rescind and cancel the license heretofore issued . . . ."[23] Similarly, the Court applied *Elliott* in *Big Bear Markets of Mich, Inc v Mich Liquor Control Comm*, holding that the plaintiff's license "was improperly granted and was, in consequence, subject to revocation" notwithstanding a showing that the party that the statute was designed to protect was willing to waive its rights under the statute.[24] In *Kassab v Acho*, the Court of Appeals more recently reaffirmed these principles, stating:

> [The defendant-licensee] argues that the commission has the authority to continue the license on the ground of manifest injustice. We disagree. As an agency, the commission has no inherent powers and, therefore, any authority

---

tions are not necessary to revoke a license. As defendant correctly note, courts have since held that a licensee has a vested property interest in the license, which entitles the holder to due process protections. See, e.g., *Bundo v Walled Lake*, 395 Mich 679; 238 NW2d 154 (1976). This latter change in the law does not render the earlier decisions irrelevant. Specifically, recognizing that licenses provide an interest to the licensee and that a licensee is entitled to due process protections before revocation does not affect the analysis regarding the revocation of invalid licenses, although revocations must now comport with due process. Moreover, courts have held only that a person is entitled to *procedural* due process in these situations. See generally *Bundo*. Thus, a licensee is entitled to timely written notice detailing the reasons for the proposed administrative action, an effective opportunity to defend and present supportive evidence, and a statement of findings. *Bundo*, 395 Mich at 696-697. This "rudimentary" due process balances the interests of a person who has invested in a license that is necessary for his livelihood with the community's interest in proper regulation. *Id.* at 696; see also *Bois Blanc Island Twp v Natural Resources Comm*, 158 Mich App 239; 404 NW2d 719 (1987). Therefore, improperly issued licenses—including the one issued to plaintiff here—may be revoked as long as the licensee is accorded procedural due process.

[23] 339 Mich 78, 82-83; 62 NW2d 594 (1954).

[24] 345 Mich 569, 576; 77 NW2d 135 (1956).

> must come from the Legislature. The commission's plenary power to regulate liquor traffic is subject to statutory restraints. The commission's rules and regulations, promulgated pursuant to the Liquor Control Act, MCL 436.7; MSA 18.977, prohibit the commission from issuing an SDD license in violation of the one-half[-]mile rule. None of the exceptions to the rule applied and, thus, the commission had no discretion to waive the rule. Where a liquor license is issued in violation of a statute, it must be revoked. Manifest injustice is not a means by which the commission may avoid legislative mandate as well as its own regulations.[25]

In short, these cases have continually reaffirmed the principle that a governmental entity cannot act in contravention of its statutory powers. When an agency does not act in accordance with its limited statutory powers, its decision should not stand, even if that action will result in a harsh outcome.

This principle is particularly important because of the structure of our government, which provides for a separation of powers among the three branches. This system requires that the Legislature and Governor make policy choices and that the courts enforce those political decisions as written. In this case, because the statute as written at the time of plaintiff's licensing in 2004 mandated that OFIS decline to license anyone who had been convicted of a felony, OFIS should not have licensed plaintiff, and this Court *cannot* use equity to displace the *statutory mandate* or otherwise validate that improper decision.

This Court has reaffirmed this basic principle underlying the separation of powers throughout its history. In *Stokes v Millen Roofing Co*, this Court held the trial court's analysis invalid because "equity is invoked to

---

[25] 150 Mich App 104, 112-113; 388 NW2d 263 (1986) (citations omitted).

avoid application of a statute. Courts must be careful not to usurp the Legislative role under the guise of equity because a statutory penalty is excessively punitive."[26] As this Court elaborated in *Bilt-More Homes, Inc v French*, and readopted in *Stokes*, it is not a court's place

> to begin the process of attrition whereby, in appealing cases, the statutory bite is made more gentle, until eventually the statute is made practically innocuous and the teeth of the strong legislative policy effectively pulled. If cases of such strong equities eventually arise that the statute does more harm than good the legislature may amend it . . . .[27]

Similarly, in *Martin v Secretary of State*, this Court again reaffirmed the guiding principle that courts cannot use equity to displace a statutory requirement designed by the Legislature.[28] There, the plaintiff was a candidate for elective office who had been misled by the Secretary of State regarding the number of signatures needed to qualify to be placed on the ballot. As a consequence, he failed to collect enough signatures by the statutory deadline and the Secretary of State refused to place his name on the ballot. We explained that courts could not use equity to compel the government to perform an act that the law clearly forbid, even when the state itself was the root cause of the problem—as is the case here.[29] Moreover, our decision affirmed that an

---

[26] *Stokes v Millen Roofing Co*, 466 Mich 660, 671-672; 649 NW2d 371 (2002).

[27] *Bilt-More Homes, Inc v French*, 373 Mich 693, 699; 130 NW2d 907 (1964) (quotation marks and citation omitted), quoted and reaffirmed in *Stokes*, 466 Mich at 672.

[28] 482 Mich 956 (2008), adopting the opinion in relevant part of Judge O'CONNELL, in *Martin v Secretary of State*, 280 Mich App 417, 430; 760 NW2d 726 (2008) (O'CONNELL, P.J., dissenting).

[29] See *Martin*, 482 Mich at 956-957 (YOUNG, J., concurring).

administrative agency is not permitted to expand its own authority beyond what the Legislature granted. As Justice MARKMAN explained,

> it is not 'manifestly unjust' for this Court to conclude that the plain words of a law enacted by the Legislature cannot be modified by a clerk in the Secretary of State's office (or indeed by the Secretary of State herself). . . . There cannot be as many laws as there are public servants who dispense guidance or advice on the meaning of the law." [30]

It would indeed be a strange system of government if every administrator or bureaucrat had the power to make decisions in derogation of the limited statutory powers provided by the Legislature. Yet the lead and concurring justices would essentially give every governmental bureaucrat the extraordinary power to countermand what the Legislature has proscribed. It is an abrogation of the legitimate exercise of judicial power to allow agency decisions to be the ultimate authority in licensing when those decisions are made in a manner contrary to a legislative mandate.

In contravention of these principles, both plaintiff and the concurring justice cite approvingly *Pittsfield Twp v Malcolm* for the proposition that there are cases that present "exceptional circumstances" whereby courts may employ equity to avoid unjust results.[31] *Malcolm* is indicative of the occasional discord in this Court's caselaw. In particular, it characterizes the unevenness by which this Court has occasionally treated the interplay between positive law and equity over the course of its history. However, I do not believe that the holding of *Malcolm* can overcome the general prohibition against applying equity to circumvent a statutory mandate, nor can it overcome the more applicable line

---

[30] *Id.* at 957 (MARKMAN, J., concurring).

[31] 375 Mich 135, 144-148; 134 NW2d 166 (1965).

of cases from this Court requiring improperly issued licenses to be revoked. Additionally, *Malcolm* is largely distinguishable on its facts because it involved a local zoning ordinance—under which discretionary exceptions (zoning variances) are often sought and obtained—and did not involve a legislatively enacted mandate. Similarly, the plaintiff's and the Court of Appeals' reliance on *Kern v City of Flint*,[32] is inapposite, even if it remains good law, because equity was used there to prevent the enforcement of terms in a contract. The Court in *Kern* did *not* use equity to overcome a *statutory* mandate, which implicates the Legislature's constitutional authority to make policy for the citizens of this state.

On the basis of my statutory construction, which I believe properly accords meaning to *all* the Legislature's chosen words in the relevant statutes and considers the *entire* structure of the Insurance Code, I would hold that the Court of Appeals erred by failing to analyze the relevant statutory provisions as they existed in 2004 and then invoking equity to avoid the result of that analysis.

II. RESPONSE TO THE LEAD OPINION'S ADDITIONAL ARGUMENTS

The lead opinion asks and answers three questions, only one of which is actually necessary for the disposition of this case: did the Insurance Code expressly prohibit OFIS from issuing a license to plaintiff in 2004? As discussed earlier, the lead opinion refuses to engage in any meaningful statutory construction in answering this question and thereby draws a conclusion that fails to give effect to all the words of the relevant statute. The lead opinion then engages in a discussion

[32] 125 Mich App 24; 335 NW2d 708 (1983).

of two questions—whether OFIS is required to revoke plaintiff's license and whether OFIS may revoke plaintiff's license under the statute as currently written—that no party or justice disputes. In short, the lead opinion's cursory attempt at statutory interpretation and other analysis theoretically supporting its disposition in this case does not scour.

The lead opinion asks "whether the commissioner is now *required* by statute to affirmatively revoke plaintiff's license on the basis of the same prior felony."[33] As far as I can tell, no party or justice disputes that the answer to this question is quite obviously "no," nor is the answer to this question relevant to a disposition here. OFIS admits that it does not seek to revoke plaintiff's license on the basis of any post-licensure conduct by plaintiff, nor does OFIS argue that the statute, as it is currently written, requires revocation. Instead, OFIS argues that because it was illegal to license plaintiff in the first place under the statute *as it existed in 2004*, the issuance of the license was outside OFIS's administrative authority and the license therefore must be revoked.

Additionally, the lead opinion asks "whether the commissioner is now *permitted* to revoke plaintiff's license on the basis of the same prior felony." It then curiously and circularly answers this question by stating that "the commissioner may not revoke a license on the basis of the erroneous belief that he must do so when, in fact, he has discretion."[34]

Again, the question posed and answer provided by the lead opinion is irrelevant to the actual argument that OFIS makes as authority for its ability to revoke

[33] *Ante* at 211.

[34] *Ante* at 216.

plaintiff's license in the instant case. As OFIS argued in its brief and as OFIS's attorney readily noted at oral argument, the OFIS commissioner in this case is not exercising his discretionary authority under MCL 500.1239. Instead, counsel for OFIS urged at oral argument that the commissioner was

> being guided by the mandatory language of [MCL 500.]1205 and further guided by this Court's decisions in similar licensing cases where this Court has clearly said when a license is granted in excess of the statutory authority or in violation of it, it's not discretionary and the agency is bound to revoke it.
>
> * * *
>
> [While] *procedurally* this is a revocation proceeding, . . . the revocation proceeding is touched off by the grant of an improper license. So it's not — this proceeding is not governed by the normal discretionary standard for revocation *because the license here was never validly issued by the agency*.

Indeed, counsel for OFIS further admitted that if this were a typical revocation proceeding governed by the discretionary standard employed in such proceedings, then the commissioner would have "no grounds to revoke Mr. King's license . . . ." However, as OFIS argues and the above analysis demonstrates, that does not dispose of the true issue in this case: whether the statute, as it was written in 2004, mandated that plaintiff not be given a license, thus making his subsequent licensure invalid. And as previously discussed, this Court's caselaw has continually reaffirmed that even though statutory revocation provisions may be written as discretionary, those revocation procedures *must* be invoked if the original license was granted in excess of an agency's authority.

By invoking a premise that OFIS readily concedes and by ignoring the argument OFIS actually proffers in defense of its action here, the author of the lead opinion renders an opinion that is largely unresponsive to the issues raised by this appeal. This error is further complicated by the fact that the lead opinion declines to address whether equity may otherwise be invoked to save plaintiff's license. Indeed, the lead opinion makes "no pronouncement about whether equity applies here or what effect it might have."[35] It does so notwithstanding the fact that the linchpin of plaintiff's entire argument is that OFIS is *equitably estopped* from revoking his license because of plaintiff's truthful disclosure of his felony and OFIS's full review and waiver of the same. Similarly, equity was also the only basis on which the lower courts rendered their decisions. However, as the above statutory analysis demonstrates, and contrary to the concurring justice's position, *equity cannot be properly invoked in this case because the statute mandates a particular outcome*. The lead opinion avoids this established principle by disclaiming that it is using equity even though its statutory analysis fails to establish a sufficient and alternative basis to do so.

Finally, the lead opinion also fails to distinguish (or even discuss) any of the relevant caselaw holding that a license issued in violation of a statute should be revoked. Nor do the justices joining the lead and concurring opinions appear willing to recognize the implications of their decision today, and I question whether those justices would draw the same conclusions if plaintiff here were less sympathetic. Consider, for example, a convicted child molester who received a license to open a daycare center, contrary to a clear statutory

[35] *Ante* at 216-217.

mandate preventing such licensure.[36] Would the majority justices here prevent the government from revoking the invalid license? Similarly, consider a dangerous felon who was inappropriately and illegally provided a license to carry a firearm, contrary to the clear statutory mandate preventing such licensure[37] and the fact that possession of a firearm by such a person is a separate crime punishable by up to five years in prison.[38] Would the majority justices here allow the felon to retain his firearm license? In these scenarios, would the concurring justices in particular still unequivocally "hold that a governmental licensing agency is estopped from revoking a license solely on the basis of the same fully disclosed and accurate facts for which it had previously granted an express waiver if the licensee has reasonably relied to his detriment on the issued license"?[39] Indeed, such a rule has the potential to establish an untenable state of affairs in which every bureaucrat would become a king unto himself whose decisions—no matter how contrary to established law—are insulated from challenge.

III. CONCLUSION

The proper interpretation of the relevant statutory provisions as articulated in this dissent would admittedly produce a result in this case that is harsh for this plaintiff who properly disclosed a condition that made him ineligible for the license he was improvidently granted. While this result is unfortunate for this particular plaintiff, it is also what the law requires. The inflexibility *purposely built into this statute* by the Legislature and approved by the Governor is the result

---

[36] See MCL 722.115g(3).

[37] See MCL 28.425b; MCL 28.425b(7)(f) and (11).

[38] See MCL 750.224f.

[39] *Ante* at 217.

of policy determinations made by those political branches of government.[40] Save those statutes that are an affront to the constitution, no court can employ its limited judicial power to overcome a valid statutory mandate. Nor can the rule of law, as prescribed by MCL 500.1205(1)(b) when read in the context of MCL 500.1239(1) and MCL 500.1206a, be displaced by the actions of OFIS administrators. An administrative agency may exercise only the powers provided to it and must act within the parameters conferred upon it by statutory law.[41] Action in excess of these powers or outside these parameters in situations in which the Legislature has mandated a specific outcome is not valid. Because the majority justices here effectively sanction such impermissible conduct, I dissent.

CORRIGAN and MARKMAN, JJ., concurred with YOUNG, J.

---

[40] The purposefulness of this inflexibility and the bright-line nature of this rule was reaffirmed when the Legislature amended MCL 500.1239(1) in 2009 in order to remove any dispute that OFIS *must* deny convicted felons a license to be a resident insurance producer. MCL 500.1239 now provides:

> (1) In addition to any other powers under this act, the commissioner may place on probation, suspend, or revoke an insurance producer's license or may levy a civil fine under section 1244 or any combination of actions, *and the commissioner shall refuse to issue a license under section 1205* or 1206a, for any 1 or more of the following causes:
>
> * * *
>
> (f) Having been convicted of a felony. [Emphasis added.]

This amended language *unanimously* passed *both* chambers of the Michigan Legislature, and was signed into law by Governor Granholm on January 5, 2009. See 2008 PA 423.

[41] See, e.g., *Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988); *Mason Co Civic Research Council v Mason Co*, 343 Mich 313, 326-327; 72 NW2d 292 (1955); *Taylor v Pub Utilities Comm*, 217 Mich 400, 402-403; 186 NW 485 (1922).

PEOPLE v LOWN

Docket No. 139969. Argued October 5, 2010 (Calendar No. 2). Decided January 14, 2011.

Donald A. Lown was arrested on a charge of second-degree home invasion in September 2005 while on parole. After several adjournments, docketing delays, other unexplained delays, and the appointment of new attorneys, defendant moved in December 2007 to dismiss the charge on the basis of the statutory 180-day rule, MCL 780.131 and MCL 780.133, which applies to inmates housed in state correctional facilities who have charges pending against them. The Saginaw Circuit Court, Lynda L. Heathscott, J., denied the motion in April 2008 on the ground that the prosecution had made good-faith attempts to prepare for trial and was at all times ready to proceed with trial. Defendant appealed that denial, and also argued that his constitutional right to a speedy trial had been violated. The Court of Appeals initially denied defendant's application for leave to appeal but, pursuant to the Supreme Court's order to consider the case as on leave granted, 483 Mich 893 (2009), the Court of Appeals, JANSEN, P.J., and FORT HOOD and GLEICHER, JJ., affirmed in part in an unpublished opinion per curiam, issued October 1, 2009 (Docket No. 287033), concluding that although more than 180 days of the total delay were caused by factors that were not attributable to defendant, dismissal was not required because the prosecution had been ready and willing to go to trial within the 180-day period and had made a good-faith effort to do so. The Court of Appeals remanded the case to the trial court to address defendant's constitutional claim. The Supreme Court granted defendant's application for leave to appeal. 485 Mich 1036 (2010).

In an opinion by Justice CORRIGAN, joined by Chief Justice YOUNG and Justices MARKMAN and HATHAWAY, the Supreme Court *held*:

The statutory 180-day rule, MCL 780.131 and MCL 780.133, requires the dismissal of a criminal case only if action is not commenced in the case within 180 days after the prosecutor receives the required notice from the Department of Corrections. If the prosecution has proceeded promptly within 180 days to move

the case to the point of readiness for trial, dismissal is not required under MCL 780.133 unless, after some preliminary step in the case occurs, that initial action is followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly.

1. MCL 780.131(1) sets forth the general rule that an inmate housed in a state correctional facility who has criminal charges pending against him or her must be brought to trial within 180 days after the Department of Corrections delivers written notice of information concerning the inmate's imprisonment to the prosecuting attorney. Under MCL 780.133, if action is not commenced on the matter within the 180-day period, the court loses jurisdiction and must dismiss the matter with prejudice. To commence action within the 180-day period in accordance with these provisions, a prosecutor need not ensure that the trial actually begins, or is completed, within that period. Rather, under *People v Hendershot*, 357 Mich 300 (1959), it is sufficient that the prosecutor proceeds promptly and moves the case to the point of readiness for trial within the 180-day period.

2. The practice of allocating periods of pretrial delay between the parties originates not from Michigan's statutory 180-day rule but from jurisprudence governing the constitutional right to a speedy trial. The balancing test applicable to speedy-trial cases employs factors that include the reasons for the pretrial delay and whether the defendant was prejudiced. Courts may consider what portions of the delay were attributable to each party when determining whether a defendant's speedy-trial rights have been violated and may attribute unexplained delays, or inexcusable delays caused by the court, to the prosecution. Because the 180-day period addressed in MCL 780.131(1) and MCL 780.133 consists of the consecutive 180 days beginning on the day after the prosecutor receives the required notice from the Department of Corrections, the relevant threshold question is not whether 180 days of delay since that date may be attributable to the prosecution, but whether action was commenced within this 180-day period in accordance with *Hendershot*. If it has, the rule is satisfied unless the prosecutor's initial steps are followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly. While a court may find it necessary to consider the causes of delay to determine whether delay beyond the period is inexcusable or whether the prosecutor lacked an evident intent to bring the case to trial promptly, this consideration is unnecessary for calculation of the statutory 180-day period, which is a fixed, consecutive period that is not subject to apportionment.

3. The statutory 180-day rule has no judicially created good-faith exception. The text of MCL 780.133 clearly contemplates that a court may retain jurisdiction despite the passage of 180 days after the Department of Corrections sent the required notice as long as action was commenced on the matter within the 180-day period. Under *Hendershot*, good faith is not an exception to this requirement, but an element of the action required within the 180-day period to avoid dismissal under MCL 780.133, which is good-faith action taken well within the period in order to ready the case for trial. A court may conclude that action was commenced on the matter within 180 days—and thus may maintain jurisdiction under MCL 780.133—only if the action was genuinely, or in good faith, taken to promptly bring the case to trial, not if the action was simply an initial step accompanied by a lack of genuine intent to move forward on the case, as evident in the prosecutor's subsequent action or inaction within or beyond the 180-day period. Interpretations of *Hendershot* that characterize its discussion of good faith as a judicially created exception to the 180-day rule are overruled.

4. MCL 780.131 and MCL 780.133 do not create a strict jurisdictional rule requiring dismissal with prejudice 180 days after the notice was sent unless a defendant requires a delay to vindicate his constitutional rights. Because MCL 780.133 deprives the court of jurisdiction only if action is not commenced within the 180-day period, the jurisdictional aspect of the rule does not hinge on whether the trial has begun or has been completed within the period. Further, because the type of jurisdiction at issue concerns the authority of the court over particular persons rather than the court's power to try the type of case at issue, it relates not to subject-matter jurisdiction but to personal jurisdiction, which is waivable. Accordingly, a defendant may forfeit the rule requiring action to commence within 180 days by requesting or consenting to delays, and if good-faith action was commenced within the 180-day period in order to ready the case for trial, the trial court is not deprived of jurisdiction even if the trial itself is not commenced or completed within the period.

Affirmed.

Justice MARILYN KELLY, joined by Justice CAVANAGH, dissenting, agreed with the majority that the statutory 180-day rule is jurisdictional, that it relates to personal rather than subject-matter jurisdiction, and that it divests a court of personal jurisdiction over a defendant if action is not commenced within 180 days of the statutorily required notice. She dissented from the majority's holding that the action that must be commenced is something other than the trial itself. Furthermore, responsibility

for the periods of delay must be ascribed to the defendant where proper in order to determine which the defendant caused and thus waived for purposes of calculating the 180-day period. By requesting or consenting to a delay, the defendant waives only that specific period of delay. Any delays caused by the prosecution or the judge must be counted in the 180-day period. Finally, she would overrule *Hendershot* and hold that the 180-day rule requires that trial be commenced within 180 days of notice to the prosecution, excluding periods of delay that the defendant waived.

Justice MARY BETH KELLY did not participate in the decision of the case, which the Supreme Court considered before she assumed office, in order to avoid unnecessary delay to the parties.

1. CRIMINAL LAW — SPEEDY TRIAL — 180-DAY RULE — COMMENCEMENT OF ACTION.

The statutory 180-day rule requires the dismissal of a criminal case pending against a defendant who is an inmate of a state correctional facility only if action is not commenced in the case within 180 days after the prosecutor receives the required notice from the Department of Corrections of the place of the inmate's imprisonment and a request for final disposition; if the prosecution has proceeded promptly within 180 days to move the case to the point of readiness for trial, dismissal is not required unless, after some preliminary step in the case occurs, that initial action is followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly (MCL 780.131[1], 780.133).

2. CRIMINAL LAW — SPEEDY TRIAL — 180-DAY RULE — DELAYS IN CRIMINAL PROCEEDINGS AGAINST INMATES — CAUSES OF DELAYS.

Delays attributable to the prosecutor or the court both within and after the statutory 180-day period within which action must be commenced against an inmate of a state correctional facility may be relevant to whether delay beyond the period is inexcusable or whether the prosecutor lacked an evident intent to bring the case to trial promptly; they are not relevant for calculating the statutory 180-day period itself (MCL 780.131[1], 780.133).

3. CRIMINAL LAW — SPEEDY TRIAL — 180-DAY RULE — JURISDICTION — PERSONAL JURISDICTION.

The provision divesting a court of jurisdiction if action against an inmate of a state correctional facility is not commenced in accordance with the statutory 180-day rule relates to personal jurisdiction and may be waived or forfeited by the defendant (MCL 780.131[1], 780.133).

Bill Schuette, Attorney General, *B. Eric Restuccia*, Solicitor General, *Michael D. Thomas*, Prosecuting Attorney, and *J. Thomas Horiszny*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jacqueline J. McCann*) for defendant.

Amicus Curiae:

Brian Peppler, *Kym L. Worthy*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

CORRIGAN, J. This case requires us to clarify the correct interpretation of the statutory "180-day rule" established by MCL 780.131 and MCL 780.133. The object of this rule is to dispose of new criminal charges against inmates in Michigan correctional facilities; the rule requires dismissal of the case if the prosecutor fails to commence action on charges pending against an inmate within 180 days after the Department of Corrections (DOC) delivers notice of the inmate's imprisonment. We reaffirm that the rule does not require that a *trial* be commenced or completed within 180 days of the date notice was delivered. Rather, as this Court has held for more than 50 years, it is sufficient that the prosecutor "proceed promptly" and "move[] the case to the point of readiness for trial" within the 180-day period. *People v Hendershot*, 357 Mich 300, 304; 98 NW2d 568 (1959). Significantly, although a prosecutor must proceed promptly and take action in good faith in order to satisfy the rule, there is no good-faith *exception* to the rule. Instead, as originally articulated in *Hendershot*, good faith is an implicit component of proper action by the prosecutor, who may not satisfy

the rule simply by taking preliminary steps toward trial but then delaying inexcusably. We further clarify that the statutory 180-day period is, by the plain terms of the statute, a fixed period of consecutive days beginning on the date when the prosecutor receives the required notice from the DOC. Thus, the relevant question is not whether 180 days of delay since that date may be attributable to the prosecutor, but whether action was commenced within 180 calendar days following the date the prosecutor received the notice. If so, the rule has been satisfied unless the prosecutor's initial steps are "followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly . . . ."[1] Accordingly, a court should not calculate the 180-day period by apportioning to each party any periods of delay after the DOC delivers notice. Finally, we note that a violation of the 180-day rule—which deprives the court of "jurisdiction," MCL 780.133—specifically divests the court of *personal jurisdiction* over the defendant for the particular action.

The statutory 180-day rule was satisfied here because the prosecutor commenced action well within 180 days after receiving notice from the DOC, "proceed[ed] promptly and with dispatch thereafter toward readying the case for trial," and "[stood] ready for trial within the 180-day period . . . ."[2] Moreover, the record contains no evidence that ensuing delays caused in part by docket congestion were without reason or otherwise inexcusable under the facts of this case; indeed, defendant either requested or explicitly consented to each adjournment. For these reasons, we affirm the judgment of the Court of Appeals.

---

[1] *Hendershot*, 357 Mich at 303.

[2] *Id.* at 304.

I. FACTS AND PROCEEDINGS

A. SEPTEMBER 2005 TO JULY 2006

Proceedings in this case began in September 2005 when the Saginaw County Prosecuting Attorney charged defendant, Donald Allen Lown, with second-degree home invasion.[3] Defendant was arrested and held in the Saginaw County jail. Because defendant was on parole, the DOC issued a parole violation hold; accordingly, defendant was ineligible for release on bond. Defendant's initial period of confinement in the county jail—from September 2005 through early May 2006—is not the basis for his current claim that the statutory 180-day rule was violated. But the events of this period in part explain why defendant still had not been tried as of August 8, 2008, when he filed this appeal.

Defendant was arraigned in the Saginaw Circuit Court on November 7, 2005. A joint trial with his codefendant was scheduled to begin on February 7, 2006. The trial was postponed after the court granted a motion for separate trials filed by defendant's first appointed attorney, Keith Skutt. Defendant subsequently offered to plead guilty. A plea hearing was scheduled for January 30, 2006. By the time of the hearing, however, defendant had changed his mind about the plea and requested a new attorney. Skutt moved to withdraw from representation and stated that defendant was "willing to waive his right to trial within 180 days" to await new counsel. The court denied the motion to withdraw. Without objection by either party, the trial was ultimately rescheduled for May 9, 2006, in part because of docket congestion.

[3] MCL 750.110a(3).

On April 20, 2006, defendant moved for release on bond—or, in the alternative, for dismissal of the home-invasion charge—because he had been jailed for more than 180 days and the trial had yet to commence. On May 1, 2006, the court granted the motion for a personal recognizance bond under MCR 6.004(C), which allows for the release on bond of defendants who are jailed for more than 180 days as a result of pending charges. The court initially delayed ruling on defendant's alternative argument that dismissal was required under the statutory 180-day rule and MCR 6.004(D), which apply to inmates of correctional facilities.[4] The prosecutor responded that the statutory rule did not apply to defendants held in county jails or to parole detainees. Meanwhile, as a result of the court's order releasing defendant on bond for the pending charge, the DOC took defendant into custody on May 4, 2006, for violating parole.

The court denied defendant's motion to dismiss under the statutory 180-day rule in an order entered on June 16, 2006, citing *People v Chavies*, 234 Mich App 274; 593 NW2d 655 (1999).[5] Defendant claims that, after he was reimprisoned by the DOC, no one took steps to ensure his availability for the May 9, 2006, trial; he claims that this failure to act caused the court to reschedule the trial for July 5, 2006. By stipulation of the parties, however, the July 5 date was adjourned and

---

[4] The rule requiring a personal recognizance bond, MCR 6.004(C)—which applies a 180-day period in certain felony cases—is distinct from the statutory 180-day rule at issue here. The statutory rule, MCL 780.131 and MCL 780.133, is reflected in MCR 6.004(D).

[5] As we will discuss further, the court and parties appear to have been unaware that, two days before the trial court's June 16, 2006, order, this Court overruled the relevant aspects of *Chavies* in *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006). Defendant's appellate counsel concedes, however, that the *Williams* opinion did not entitle defendant to dismissal under the 180-day rule at the time of his first motion to dismiss.

the trial was rescheduled for September 19, 2006, to accommodate defense counsel's summer vacation plans. On July 17, 2006, Skutt filed another motion to withdraw as counsel, stating that defendant had filed a grievance against him with the Attorney Grievance Commission. On July 28, 2006, the court granted Skutt's motion to withdraw and appointed a second attorney, Timothy Lynch, to represent defendant.

Around this time the DOC sent certified written notice of defendant's incarceration to the prosecutor as required by MCL 780.131. The prosecutor received the notification no later than July 22, 2006.[6] Thus, the statutory 180-day period relevant to this appeal began on July 23, 2006.[7]

B. SEPTEMBER 2006 TO APRIL 2008

On the next scheduled trial date of September 19, 2006, defendant rejected a plea agreement offered by the prosecutor. Lynch moved for an adjournment to allow more time for trial preparation. Defendant stated on the record that he had no objection to the adjournment. The trial was rescheduled for November 28, 2006. On that date, the parties again appeared. Defendant rejected yet another plea offer from the prosecutor, and

[6] Defendant states that the prosecutor received notice no later than July 22, 2006. July 22, 2006, is also the date employed by the Court of Appeals in its analysis. Accordingly, we rely on the July 22 date here. Defendant nonetheless observes that the return receipt for the notice appears to have been signed by the prosecutor's office on July 19, 2006. Moreover, in its brief before the trial court, the prosecution admitted receiving notice on July 18, 2006, which was the date the trial court used in its analysis. Using either of the earlier possible receipt dates in our analysis would not change the outcome of this case.

[7] *Williams*, 475 Mich at 256 n 4 (stating that the 180-day period begins the day after the prosecution receives the written notice required by MCL 780.131).

both sides were prepared for trial. But, because defendant was imprisoned with the DOC on prior convictions as a result of his parole violation—that is, he was not incarcerated as a result of the pending charge—the court itself adjourned the trial so proceedings against local jail inmates could take precedence. The court stated that defendant "will be tried next year." Neither party objected.

The trial was next scheduled to begin on April 24, 2007. At a hearing on that date the court denied defendant's motion to dismiss Lynch and asserted that jury selection would begin later that week. Off the record, the trial was adjourned yet again to July 11, 2007, apparently as a result of docket congestion. On July 11, 2007, the case was adjourned to September 5, 2007. The court explained simply: "We've taken the time here to determine when this case is going to be reset and everybody is going to be available."

The case was pushed to one day later, September 6, 2007, at which time the parties appeared and the prosecution stated that it was ready to proceed. But, in the meantime, Lynch had moved to withdraw as counsel, noting defendant's "antagonistic, demeaning, denigrating attitude" towards him and stating that defendant had filed an unwarranted grievance against him with the Attorney Grievance Commission. The court granted the motion. James Tiderington was appointed as replacement counsel for the defense on September 12, 2007.

The trial was rescheduled for December 4, 2007. On that date, the court granted Tiderington's motion for an adjournment in order to file a motion to dismiss under the statutory 180-day rule. In a December 7, 2007, motion, Tiderington observed that the Court of Appeals' opinion in *Chavies*—on which the trial court

relied in its June 16, 2006, order denying defendant's first motion to dismiss—had been overruled by the June 14, 2006, *Williams* decision. The court ordered briefing and held two hearings to consider the issue.

In an April 15, 2008, opinion and order, the court denied defendant's motion. It noted that, although 180 days had passed since the prosecutor received notice from the DOC, the "good faith exception" to the 180-day rule precluded dismissal.[8] The prosecution had taken good-faith action toward preparing for trial within the 180-day period—indeed it was, "at all times, ready, willing and able to proceed with trial of this case"—and "[a]ll adjournments were made at the Defendant's request or otherwise beyond the Prosecution's control." Over the prosecutor's objection, the court also granted defendant's motion to stay the proceedings while defendant appealed its ruling in the Court of Appeals.

C. APPELLATE PROCEEDINGS

The Court of Appeals[9] affirmed in part, concluding that the statutory 180-day rule did not require dismissal of the home-invasion charge.[10] Citing *People v*

[8] The court cited caselaw that included *Hendershot*.

[9] *People v Lown*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 2009 (Docket No. 287033). The Court of Appeals had initially denied defendant's application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review." *People v Lown*, unpublished order of the Court of Appeals, entered October 30, 2008 (Docket No. 287033). Defendant applied for leave to appeal in this Court and we remanded, directing the Court of Appeals to consider the case as on leave granted. *People v Lown*, 483 Mich 893 (2009).

[10] The Court of Appeals remanded for further proceedings before the trial court concerning defendant's separate claim—which was not addressed by the trial court—that the delays deprived him of his constitu-

Crawford, 232 Mich App 608, 613-615; 591 NW2d 669 (1998), the Court began by calculating the period of delay specifically attributable to the prosecution or the court, and not attributable to defendant, beginning on July 23, 2006. The Court concluded that more than 180 days of the total delay were caused by docket congestion or unexplained factors that must be attributed to the prosecution under *People v England*, 177 Mich App 279, 285; 441 NW2d 95 (1989).

Nonetheless, the Court concluded that dismissal was not required because the prosecution was "ready and willing to go to trial at least as early as September 19, 2006."[11] The Court observed that this date was "well within the initial 180-day period, and it appears from the record that the prosecution had made a good-faith effort to proceed to trial at that time."[12] Thus, the Court concluded that the 180-day rule was not violated, applying the reasoning of *People v Michael Davis*, 283 Mich App 737; 769 NW2d 278 (2009). *Davis* relied on this Court's decision in *Hendershot* to conclude that " 'trial or completion of trial' " within the 180-day period is unnecessary to satisfy the statutory rule; rather, if " 'apparent good-faith action is taken well within the [180-day] period and the people proceed promptly and with dispatch thereafter toward readying the case for trial, the condition of the statute for the court's retention of jurisdiction is met.' "[13]

Defendant petitioned this Court to review the Court of Appeals' judgment. We granted his application for

---

tional right to a speedy trial under the United States and Michigan Constitutions and related statutory and court rule provisions. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; MCR 6.004(A). This issue is not currently before us.

[11] *Lown*, unpub op at 4.

[12] *Id.*

[13] *Davis*, 283 Mich App at 741, quoting *Hendershot*, 357 Mich at 304.

leave to appeal and directed the parties to include among the issues to be briefed

> (1) whether the 180-day rule, MCL 780.131 and 780.133, is jurisdictional, and if so, whether it permits any delay in trial beyond 180 days from the date of the Department of Corrections notice; (2) whether a strict jurisdictional reading of the rule violates a defendant's constitutional rights when a delay in trial beyond the 180 days is sought by the defendant, as occurred in this case; (3) whether, if some delay in trial beyond 180 days is permitted by the statutory provisions, any such delay should be evaluated by attributing it to the defendant or the prosecution, and if so, whether action of the circuit court, such as delay due to docket management concerns, should automatically be attributed to the prosecution; (4) whether a prosecutor's good-faith efforts to bring a defendant to trial within the initial 180-day period is of any relevance in the application of the statutory provisions, and if so, whether the prosecutor must remain prepared at all times to go to trial in order to avoid dismissal of the case under the rule; and (5) if this Court were to determine that the 180-day rule is jurisdictional and does not permit any delays in the commencement of trial, whether and to what extent that determination should be applied retroactively.[14]

II. STANDARD OF REVIEW

This case requires us to consider the meaning and proper application of MCL 780.131 and MCL 780.133. We review de novo questions of statutory interpretation.[15] Our goal when interpreting a statute is to "ascertain and give effect to the intent of the Legislature" as manifested in the plain language of the statute.[16] If the language is "clear and unambiguous," we need go

---

[14] *People v Lown*, 485 Mich 1036 (2010).

[15] *People v Charles Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003).

[16] *Id.*

no further; courts will not engage in additional judicial construction of an unambiguous statute.[17]

III. DISCUSSION

A. INTERPRETATION OF THE STATUTORY 180-DAY RULE

The relevant subsection of MCL 780.131 provides:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail.[18]

Thus, MCL 780.131(1) states the general rule requiring that an inmate housed in a state correctional facility who has criminal charges pending against him "shall be brought to trial within 180 days after" the DOC delivers written notice of information concerning the inmate's imprisonment to the prosecuting attorney. The 180-day

---

[17] *Id.*

[18] MCL 780.131(1).

period begins running on the day after the prosecutor receives the required notice.[19]

MCL 780.133 governs failure to comply with the 180-day rule:

> In the event that, within the time limitation set forth in [MCL 780.131], action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

This provision specifies that if "action is not commenced on the matter" within the 180-day period, the court loses jurisdiction and must dismiss the matter with prejudice. It does not employ the same word used in MCL 780.131(1); it does not state that the court loses jurisdiction if the *trial* has not begun. It also does not state that the court loses jurisdiction if the action is not *complete*. Rather, it requires the commencement—or *beginning*—of "action." In this context, the word "action" has complementary and relatively uncontroversial meanings. "Action" may encompass, for example, the "process of doing something; conduct or behavior," an act or a "thing done," or, in the context of court proceedings, a "civil or criminal judicial proceeding."[20] A "proceeding," in turn, generally includes the "regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment"; it may also mean an "act or step that is part of a larger action."[21] Thus, this Court has long held that to commence action within the 180-day period, a prosecutor need not ensure that the *trial*

---

[19] *Williams*, 475 Mich at 256 n 4.

[20] Black's Law Dictionary (7th ed).

[21] *Id.*

actually begins, or is completed, within that period. Rather, the prosecutor must have undertaken action—or, put otherwise, begun proceedings—against the defendant on the charges (or the "matter").[22] As we explained in *Hendershot*:

> The statute does not require the action to be commenced so early within the 180-day period as to insure trial or completion of trial within that period. If . . . apparent good-faith action is taken well within the period and the people proceed promptly and with dispatch thereafter toward readying the case for trial, the condition of the statute for the court's retention of jurisdiction is met.[23]

Accordingly,

> [w]hen the people have moved the case to the point of readiness for trial and stand ready for trial within the 180-day period, defendant's delaying motions, carrying the matter beyond that period before the trial can occur, may not be said to have brought the statute into operation, barring trial thereafter.[24]

On the other hand, if the prosecutor takes no action or delays inexcusably after taking preliminary steps, the rule may be violated:

---

[22] Contrast *People v Swafford*, 483 Mich 1, 3; 762 NW2d 902 (2009), in which we had "no choice" but to dismiss the charges with prejudice on the basis of the language of the Interstate Agreement on Detainers (IAD), MCL 780.601, which expressly premises dismissal on a prisoner not being "brought to trial within" 180 days of notice. *Swafford* explained that "[h]owever harsh and inflexible a remedy for failure to comply with the IAD this may be adjudged, it is plainly what our Legislature requires." *Swafford*, 483 Mich at 17. The distinct language of MCL 780.133 plainly does *not* require dismissal although a prisoner was not brought to trial within 180 days if the prosecutor nonetheless commenced action in the case within that period.

[23] *Hendershot*, 357 Mich at 304.

[24] *Id.*

> Clearly, if no action is taken and no trial occurs within 180 days, the statute applies. If some preliminary step or action is taken, followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly, the statute opens the door to a finding by the court that good-faith action was not commenced as contemplated by [MCL 780.133], thus requiring dismissal.[25]

In this case, the Court of Appeals correctly relied on these propositions from *Hendershot*, as quoted by the Court of Appeals' decision in *Davis*.[26] The 180-day period began July 23, 2006, and ended January 19, 2007. As the Court of Appeals concluded, the prosecutor not only commenced action within this period but was prepared to proceed to trial at least by September 19, 2006, which was the first scheduled trial date after the 180-day period commenced. Trial was postponed that day as the result of defense counsel's motion for adjournment; defendant himself expressly stated on the record that he did not object to the adjournment. The record further shows that the prosecutor remained ready for trial at subsequent rescheduled trial dates, including November 28, 2006; April 24, 2007; and September 6, 2007. On the next scheduled trial date, December 4, 2007, defendant moved to adjourn to bring the motion to dismiss under the 180-day rule that led to this appeal. In the words of the trial court, the prosecutor was, "at all times, ready, willing and able to proceed with trial of this case." Indeed, the record shows that the victims of the home invasion were also in the courtroom, ready to testify, on each of the numerous scheduled trial dates.

---

[25] *Id.* at 303-304.

[26] *Lown*, unpub op at 4, quoting *Davis*, 283 Mich App at 741-742.

Further, the court itself appears to have been ready to proceed as of September 19, 2006, when defendant moved to adjourn. Later adjournments were attributable both to the defense and to docket congestion. The Court of Appeals has observed that the "burden imposed" by MCL 780.131 and MCL 780.133 "rests as much upon the court as upon the prosecutor" because "the scheduling of cases is not controlled by the prosecutor."[27] Accordingly, the Court of Appeals here relied on cases, including *England*, for the proposition that " '[a]ll adjournments without reason and unexplained delays are chargeable to the prosecution' " without regard to whether the prosecutor is otherwise ready to proceed to trial.[28] As we will discuss further, the Court of Appeals erred when calculating the 180-day period by attributing individual periods of delay to the parties. But, to the extent that docket congestion could be relevant, clearly the congestion here was generally explained and excusable. At several hearings, the court explicitly confirmed that defendant would not be prejudiced by further adjournments because he was imprisoned as a result of sentences for prior convictions to which any new sentences would be consecutive. Indeed, several adjournments were necessary because other defendants, who unlike defendant were jailed solely as a result of pending charges, *would* be prejudiced by additional delays. Finally, defendant did not object—and often explicitly consented—to the adjournments attributable to docket congestion. Accordingly, even if the court was responsible for delaying the proceedings after action was commenced, first, the record does not reflect that the delays were

[27] *People v Wolak*, 153 Mich App 60, 65; 395 NW2d 240 (1986).

[28] *Lown*, unpub op at 2, quoting *England*, 177 Mich App at 285, which cited, among other cases, *Wolak*.

unexplained or without reason in the context of this case, and, second, defendant waived or forfeited any error in this regard.

For these reasons, the trial court properly denied defendant's motion to dismiss the case under the 180-day rule, and the Court of Appeals properly affirmed that denial. Action was commenced "well within the period," and the prosecution "proceed[ed] promptly and with dispatch thereafter toward readying the case for trial" and "[stood] ready for trial within the 180-day period."[29] And there is no evidence that ensuing delays caused by docket congestion were without reason or otherwise inexcusable under the facts of this case.

Moreover, this analysis alone was a sufficient basis for the lower courts' conclusions that the 180-day rule was satisfied. It was unnecessary for the Court of Appeals to calculate the number of days of delay attributable to the prosecutor, the court, or defendant beginning on July 23, 2006. The relevant statutory provisions do not describe the 180-day period as 180 total days *of delay* attributable to the prosecutor or court, after which the court may lose jurisdiction of the case. Rather, they plainly describe the period as a single term consisting of 180 consecutive days beginning at the time the DOC delivers the required written notice to the prosecutor. MCL 780.131(1) states that the inmate "shall be brought to trial *within 180 days after*" the DOC delivers notice. (Emphasis added.) MCL 780.133 similarly deprives the court of jurisdiction if "action is not commenced" "*within the time limitation* set forth in [MCL 780.131]." (Emphasis added.)

The practice of allocating periods of pretrial delay between the parties originates not from Michigan's statutory 180-day rule, but from jurisprudence govern-

[29] *Hendershot*, 357 Mich at 304.

ing the constitutional right to a speedy trial.[30] The necessary inquiries are distinct. The United States Supreme Court established a balancing test applicable to speedy trial cases in *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972), which this Court adopted in *People v Grimmett*, 388 Mich 590, 602-606; 202 NW2d 278 (1972).[31] Relevant factors under this test include the reasons for the pretrial delay and whether the defendant was prejudiced.[32] Accordingly, courts may

---

[30] Periods of pretrial delay may also be allocated in other circumstances when called for by the governing statute or rule. For example, the statute governing Michigan's 180-day rule stands in contrast to the IAD, which, as previously noted, premises dismissal not on the failure to *commence action* within 180 days of notice, as in MCL 780.133, but solely on a prisoner not being "brought to trial within" 180 days of notice. Accordingly, the IAD expressly permits—and thus excludes from the 180-day period—"necessary or reasonable continuance[s]" for "good cause shown in open court . . . ." MCL 780.601, art III(a).

A day count and assignment of responsibility for periods of delay are also expressly required by Michigan's pretrial release rule, MCR 6.004(C), which applies to defendants who are incarcerated as a result of pending charges. Under this rule, "[i]n computing the 28-day and 180-day periods" after which a defendant generally must be released on personal recognizance during the pendency of the proceedings, "the court is to exclude" delays caused by various events including, for example, "adjournment[s] requested or consented to by the defendant's lawyer." MCR 6.004(C)(3).

The absence of any equivalent language in MCL 780.131 or MCL 780.133 referring to apportioning delay or granting continuances is highly significant. As noted, MCL 780.133 prescribes a harsh penalty—dismissal of the criminal charge with prejudice. It is entirely rational for the Legislature to have employed language that ensures that this penalty obtains only when "action is not commenced," rather than when the defendant is not "brought to trial," when it drafted a serious penalty provision that contains no mechanism for granting continuances or apportioning delay.

[31] See *People v Chism*, 390 Mich 104, 111; 211 NW2d 193 (1973); *People v Collins*, 388 Mich 680, 688; 202 NW2d 769 (1972).

[32] See *Barker*, 407 US at 530; *Chism*, 390 Mich at 111.

consider which portions of the delay were attributable to each party when determining whether a defendant's speedy trial rights have been violated[33] and may attribute unexplained delays—or inexcusable delays caused by the court—to the prosecution.[34]

Some cases have employed these elements of the speedy trial test when reviewing motions for dismissal under the statutory 180-day rule. For example, in *Crawford*, 232 Mich App at 613, and *England*, 177 Mich App at 285—on which the Court of Appeals here relied—the Court applied the statutory 180-day rule in part by calculating how many days of delay were "chargeable" to the prosecutor after the prosecutor received the required DOC notice. But neither case offered a full explanation of why it imported the speedy trial test into this context. Rather, each case primarily cited portions of other cases that addressed speedy trial challenges.[35]

We clarify that the 180-day period addressed in MCL 780.131 and MCL 780.133 consists of the consecutive 180 days beginning on the day after the prosecutor receives the required notice from the DOC. The relevant threshold question is, therefore, not whether 180 days of delay since that date may be attributable to the prosecutor, but whether action was commenced within this 180-day period as described earlier, in accordance with *Hendershot*. If so, the rule has been satisfied unless the prosecutor's initial steps were "followed by inexcusable delay beyond the 180-day period and an

---

[33] See, e.g., *Chism*, 390 Mich at 112.

[34] See, e.g., *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985); *People v Carner*, 117 Mich App 560, 577; 324 NW2d 78 (1982).

[35] *England*, 177 Mich App at 286, relied primarily on cases analyzing the constitutional right to a speedy trial, including *Barker*, 407 US at 527; *People v Patterson*, 170 Mich App 162; 427 NW2d 601 (1988), remanded on other grounds 437 Mich 895 (1990); and *Ross*, 145 Mich App 483. *Crawford*, 232 Mich App at 614, relied in part on *England*.

evident intent not to bring the case to trial promptly . . . ."[36] Certainly, delays attributable to the prosecutor or the court both within and after the 180-day period may be relevant to whether delay beyond the period is inexcusable or whether the prosecutor lacked an evident intent to bring the case to trial promptly. Accordingly, a court may find it necessary to consider the causes of delay. But doing so is unnecessary for calculating the statutory 180-day period, which is a fixed, consecutive period that, unlike periods of delay considered under a speedy trial analysis, is not subject to apportionment.

B. THE PROSECUTOR'S DUTY TO ACT IN GOOD FAITH

We further clarify that, contrary to the trial court's assertion, the statutory 180-day rule has no judicially created "good-faith exception." The trial court observed that a so-called good-faith exception to the rule was created by the references to a prosecutor's good-faith action in *Hendershot*. But *Hendershot* should be read consistently with the plain language of MCL 780.133—not to create an exception that has no basis in the statutory text.

The text of MCL 780.133 clearly contemplates that a court may retain jurisdiction although 180 days have passed after the DOC sent the required notice as long as "action" was "commenced on the matter" within the 180-day period. *Hendershot* is best read as discussing good faith not as an exception to this requirement, but as an element of the action required within the 180-day period to avoid dismissal under MCL 780.133. Indeed, *Hendershot* defined commencing action as "good-faith action . . . taken well within the period" in order to

[36] *Hendershot*, 357 Mich at 303.

ready the case for trial.[37] Significantly, it did so in part to explain that the trial *itself* need not take place within the period for the court to retain jurisdiction under MCL 780.133.[38] Thus, it effectively distinguished good-faith action to bring the case to trial from a mere "preliminary step or action" that is "followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly . . . ."[39] It concluded that, upon a showing that the prosecutor merely took such a preliminary step and then delayed and did not genuinely intend to bring the case to trial promptly, "the statute opens the door to a finding by the court that good-faith action was not commenced *as contemplated by* [*MCL 780.133*] . . . ."[40] In other words, a court may conclude that "action" was "commenced on the matter" within 180 days—and thus may maintain jurisdiction under MCL 780.133—only if the action was genuinely (or *in good faith*) taken to promptly bring the case to trial, *not* if the action was simply an initial step accompanied by a lack of genuine intent to move forward on the case, as evident in the prosecutor's subsequent action or inaction within or beyond the 180-day period. Accordingly, we overrule interpretations of *Hendershot* that characterize its discussion of good faith as a judicially created *exception* to the 180-day rule.

For example, we note *People v Walker*, 276 Mich App 528; 741 NW2d 843 (2007), vacated in part 480 Mich 1059 (2008), which the trial court in this case discussed.

---

[37] *Id.* at 304.

[38] *Id.* ("The statute does not require the action to be commenced so early within the 180-day period as to insure trial or completion of trial within that period.").

[39] *Id.* at 303.

[40] *Id.* at 303-304 (emphasis added).

Walker cited *Hendershot* as creating a good-faith exception to the 180-day rule.[41] *Walker* proceeded to conclude that this Court's opinion in *Williams* "implicitly overruled the 'good-faith' exception."[42] This Court vacated the *Walker* Court's references to the so-called exception as dicta.[43] As a result, the trial court in this case concluded that our order in *Walker* effectively indicated that the good-faith exception *persisted*, contrary to the *Walker* appeals panel's conclusion. But nothing in *Williams*, in our order in *Walker*, or in the amendment of MCR 6.004(D) either condones *or* condemns a good-faith *exception*. Nor did this Court's actions in these matters otherwise address whether the general requirement that a prosecutor ready himself for trial in good faith, as described in *Hendershot*, is consistent with the statutory language. Rather, as the Court of Appeals would later recognize in *Davis*, *Williams* declined to overrule *Hendershot* and, moreover, the good-faith issue was not directly before the Court in *Williams*.[44]

---

[41] *Walker*, 276 Mich App at 538-539.

[42] *Id.* at 540. *Walker* stressed the *Williams* Court's statement that a prior version of the court rule implementing the statutory 180-day rule—MCR 6.004(D), which, among other things, required the prosecutor to "make a good faith effort to bring a criminal charge to trial" within the 180-day period—"was invalid to the extent that it improperly deviated from the statutory language." *Williams*, 475 Mich at 259. Hence the *Walker* Court concluded that *Williams* rejected a good-faith exception.

[43] *People v Walker*, 480 Mich 1059 (2008).

[44] *Davis*, 283 Mich App at 743. *Williams* primarily overruled *People v Smith*, 438 Mich 715; 475 NW2d 333 (1991), which had held, contrary to the language of MCL 780.131, that the statutory 180-day rule does not apply when the pending charge calls for mandatory consecutive sentencing. *Williams*, 475 Mich at 248. *Williams* also overruled *People v Hill*, 402 Mich 272; 262 NW2d 641 (1978), to the extent *Hill* wrongly established that the 180-day period begins when the prosecutor knows, or when the DOC knows or has reason to know, that a person with charges pending against him is a prison inmate; this conclusion was clearly incorrect given that MCL 780.131 unambiguously provides that the 180-period is trig-

Accordingly, as the Court of Appeals correctly held in *Davis*, *Williams* did not affect the general rule from *Hendershot* that dismissal is required under MCL 780.133 only if the prosecutor failed to take good-faith steps to commence action within 180 days of receiving notice from the DOC of an offender's imprisonment. But, as we have explained, good-faith action by the prosecutor does not create an extrastatutory *exception* to the 180-day rule. Rather, a good-faith intent to ready the case for trial describes an implicit *component* of the steps that must be taken within the 180-day period in order for the rule to be satisfied although a trial is not completed within that period. Good-faith action is invoked specifically in contrast to action that, although it takes place within 180 days, consists merely of preliminary steps that are later followed by inexcusable delay and the lack of a genuine intent to proceed to trial. Thus, the good-faith aspect of the 180-day rule *protects defendants* by making clear that merely *any* action by the prosecutor, without regard to whether the action is genuinely designed to promptly bring the case to trial, does not automatically satisfy the rule's intent as expressed by its plain terms; good-faith action does *not* create an *exception* benefitting the *prosecutor*.

---

gered when the DOC sends notice to the prosecutor. *Williams*, 475 Mich at 259. Significantly, it was in overruling *Hill* that the *Williams* Court approved the 2006 amendment to MCR 6.004(D), which deleted the sections of the rule that had codified *Hill*, former MCR 6.004(D)(1)(a) and (b), and entirely rewrote subrule (D) to track the language of MCL 780.131 and MCL 780.133. When *Williams* stated that the prior version of MCR 6.004(D) "was invalid to the extent that it improperly deviated from the statutory language," 475 Mich at 259, it was not considering that MCR 6.004(D)(1) also no longer stated that the prosecutor "must make a good faith effort to bring a criminal charge to trial" within the 180-day period, as had the prior version.

C. THE JURISDICTIONAL ASPECT OF THE 180-DAY RULE

Finally, we address defendant's argument that MCL 780.131 and MCL 780.133 create a strict jurisdictional rule requiring dismissal with prejudice 180 days after delivery of the DOC's notice unless a defendant requires a delay to vindicate his constitutional rights. This argument fails, first and foremost, because it depends on defendant's claim that the 180-day rule is violated if a trial does not take place within the 180-day period. As we have explained, such a conclusion runs directly contrary to the plain language of MCL 780.133, which deprives the court of jurisdiction only if "action is not commenced" within the 180-day period; the jurisdictional aspect of the rule does not hinge on whether the *trial* has begun or has been completed within the period. Whether action has been commenced remains governed by the analysis of this question in *Hendershot*. In concluding that *Hendershot* is no longer good law on this subject, defendant relies primarily on statements in *Williams* that he nonetheless admits are dicta. The *Williams* Court stated, for example, that the 180-day rule "provides that a prison inmate who has a pending criminal charge *must be tried* within 180 days" after the DOC delivers notice and "requires dismissal with prejudice if a prisoner *is not brought to trial* within the 180-day time limit . . . ."[45] As discussed earlier, this element of the rule was not before the *Williams* Court and the statements were, indeed, nonbinding obiter dicta.[46] The *Williams* opinion was not intended to make—nor did it make—pronouncements concerning what constitutes commencing action for purposes of the 180-day rule.

---

[45] *Williams*, 475 Mich at 247, 252 (emphasis added).

[46] Obiter dicta, or "dicta," are not binding precedent. Rather, they are statements that are not essential to determination of the case at hand and, therefore, "lack the force of an adjudication." *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006) (citations and quotation marks omitted).

Second, defendant's argument implicitly presumes that MCL 780.133 deprives the court of *subject matter* jurisdiction when the 180-day rule is violated. Subject matter jurisdiction "concerns a court's 'abstract *power* to try a case of the kind or character of the one pending' *and is not dependent on the particular facts of the case.*"[47] Because it concerns the court's power to hear a case, it is not subject to waiver.[48] But the court's jurisdiction over a particular person is another matter; a party may stipulate to, waive, or implicitly consent to *personal* jurisdiction.[49] The circuit court here had subject matter jurisdiction over the home invasion charge; Michigan circuit courts are courts of general jurisdiction and unquestionably have jurisdiction over felony cases.[50] Because the jurisdictional aspect of the 180-day rule, MCL

---

[47] *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 733 (2001), quoting *Campbell v St John Hosp*, 434 Mich 608, 613-614; 455 NW2d 695 (1990) (emphasis in *Travelers*).

[48] *Travelers*, 465 Mich at 204.

[49] *Burger King Corp v Rudzewicz*, 471 US 462, 473 n 14; 105 S Ct 2174; 85 L Ed 2d 528 (1985) ("[B]ecause the personal jurisdiction requirement is a waivable right, there are a variety of legal arrangements by which a litigant may give express or implied consent to the personal jurisdiction of the court.") (citations and quotation marks omitted); *People v Phillips*, 383 Mich 464, 470; 175 NW2d 740 (1970) ("[N]o reason appears why an accused could not subject himself to the court's personal jurisdiction. The procedural safeguards spelling out the method whereby a court obtains jurisdiction over the person of an accused are all designed for his protection. If he elects not to avail himself of the established procedural rights there appears to be none who should be heard to complain."); see also *People v Eaton*, 184 Mich App 649, 652-653; 459 NW2d 86 (1990) (discussing the 180-day rule and helpfully summarizing: "Jurisdiction involves the two different concepts of subject-matter jurisdiction and personal jurisdiction. Subject-matter jurisdiction encompasses those matters upon which the court has power to act. Personal jurisdiction deals with the authority of the court to bind the parties to the action. Subject-matter jurisdiction is never waivable nor may it be stipulated to by the parties. Personal jurisdiction, however, is always waivable and defects may be corrected by stipulation.").

[50] Const 1963, art 6, §§ 1 and 13; MCL 600.151; MCL 600.601; MCL 767.1.

780.133, requires dismissal of a particular defendant in a particular case when the rule is violated, however, the rule governs *personal* jurisdiction and thus is waivable.

Justice BOYLE reached this very result following a well-reasoned analysis in her concurring opinion in *People v Smith*[51] when she concluded that a violation of the 180-day rule is waived by an unconditional guilty plea. Observing that the term "jurisdiction" is "susceptible of various meanings within the realm of criminal procedure," she opined that the term as employed in MCL 780.133 "cannot be said to unambiguously refer to the power of the court to entertain a class of cases, i.e., subject-matter jurisdiction."[52] "Rather, the statute represents a limitation on the power to prosecute in specified circumstances, viz., where an existing warrant, information or charge against a prisoner is not disposed of in a timely manner as provided in MCL 780.131."[53] Because "the statute decrees that a court loses its power over a *particular* matter in specified circumstances," personal jurisdiction—which "deals with the authority of the court over particular persons"—is at issue; and it is "a fundamental principle that defects in personal jurisdiction may be waived . . . ."[54] We adopt

---

[51] *Smith*, 438 Mich at 719-729 (BOYLE, J., concurring), overruled on other grounds by *Williams*, 475 Mich 245.

[52] *Smith*, 438 Mich at 724, 725 (BOYLE, J., concurring).

[53] *Id.* at 725.

[54] *Id.* at 724-725. The Court of Appeals reached the same conclusion in *Eaton*, 184 Mich App 649. The Prosecuting Attorneys Association of Michigan as amicus curiae also helpfully describe the jurisdictional aspect of the 180-day rule as an "inflexible claim-processing rule." Such rules have been distinguished from rules affecting subject matter jurisdiction by the United States Supreme Court. That Court has observed that the word "jurisdiction" is one "of many, too many, meanings" that is "more than occasionally" used not in a strict sense, but to "describe emphatic time prescriptions in rules of court." *Kontrick v Ryan*, 540 US 443, 454; 124 S Ct 906; 157 L Ed 2d 867 (2004) (citation and quotation

Justice BOYLE's analysis on these points.

Our conclusion that a violation of the statutory 180-day rule does not deprive the court of subject matter jurisdiction is significant because it further defeats defendant's argument that if the 180-day period is exceeded for a reason other than vindication of a defendant's constitutional rights, the court is forever deprived of the power to hear the case. To the contrary, because subject matter jurisdiction is not at issue, a defendant may forfeit the rule requiring commencement of action within 180 days by requesting or consenting to delays, as defendant did many times throughout the proceedings in this case. Our conclusion also reinforces the text of the statute, which clearly conveys that the 180-day period does not describe an automatic cut-off point when the court loses jurisdiction, no matter what events have transpired in the meantime, unless the defendant sought a continuance to protect a constitutional right. Rather, as long as good-faith action was commenced within the 180-day period in order to ready the case for trial, the trial court is not deprived of jurisdiction although the trial itself is not commenced or completed within the period.

IV. RESPONSE TO THE DISSENT

The dissent premises its discussion on its conclusion that, "[e]ven though the [180-day] rule does not expressly require a day count and assignment of respon-

---

marks omitted). Noting a "critical difference between a rule governing subject-matter jurisdiction and an inflexible claim-processing rule," the Court stressed that a claim-processing rule can be forfeited by the parties, whereas, "[c]haracteristically, a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Id.* at 456.

sibility for periods of delay, both requirements are implicit in the statute." We reject this premise because it is based not on the explicit text of the statute, but on judicially created "implicit" requirements. The statutory text could not be clearer. The relevant time limit—"within 180 days after" the DOC delivers the required notice, MCL 780.131(1)—describes a single term of 180 consecutive days following the DOC's delivery of the notice. It does not describe a judicially calculated total period of delay attributable to the prosecutor or the court.

Further, defendants are not prejudiced by this statute, as the dissent fears. A defendant may agree to delay proceedings in the case at will; *he* is not prejudiced by the fixed 180-day period. Rather, the statute places the burden on the *state*; only the prosecutor is bound and must commence action—and remain ready to proceed to trial—within 180 days. Although a defendant may consent to delay the proceedings, the prosecutor must remain ready to proceed to trial—and to avoid *inexcusable* delay—when the agreed upon period of delay expires.[55]

The dissent's fears of prejudice to the defendant arise, moreover, primarily from its incorrect assertion that the *trial* must begin or be completed within 180 days. But a defendant is *only* prejudiced by the inability to raise pretrial constitutional issues or prepare for trial if the prosecutor is forced to commence *trial*—as op-

[55] Moreover, we do not hold that inexcusable docket congestion or other causes of delay not directly attributable to the prosecutor are irrelevant to the inquiry. Rather, as discussed, the docket congestion here was explained and excusable. The court was ready to proceed on September 19, 2006, when defendant moved to adjourn. Defendant did not object—and often directly consented—to the later adjournments, and the court considered whether defendant would be prejudiced by the further delays.

posed merely to commencing *action*—within 180 days, as the dissent suggests. The dissent wrongly focuses on MCL 780.131(1), which refers to a defendant's being "brought to trial." But MCL 780.133, not MCL 780.131, governs when jurisdiction is lost as the result of a violation of the 180-day rule. We underscore the Legislature's choice of a broader word in MCL 780.133, which does *not* refer to the commencement of "trial," but refers to commencement of "action" on the matter.

Finally, for these reasons, our historical precedent in *Hendershot* is consistent with the plain statutory language. Accordingly, *Hendershot* was not wrongly decided and should not be overruled.

V. CONCLUSION

The statutory 180-day rule, MCL 780.131 and MCL 780.133, may be invoked to require dismissal of a criminal case only if action is not commenced in the case within 180 days after the prosecutor receives the required notice from the DOC. The rule does not deprive the court of its power to hear the case simply because the *trial* has not commenced within that period, let alone because the trial has not been completed. Rather, as this Court has held for more than 50 years, the rule requires the prosecutor to proceed promptly within 180 days to move the case to the point of readiness for trial. As long as the prosecutor does so, dismissal is not required under MCL 780.133 unless, after some preliminary step in the case occurs, that initial action is followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly. Under such circumstances, the court may conclude that action was not in fact meaningfully or genuinely commenced as required by MCL 780.133; put otherwise, the court may conclude

that action was not commenced in good faith. But good-faith action should not be viewed as an *exception* to the rule; in this context, the requirement that a prosecutor proceed in "good faith" means simply that he must in fact commence action and cannot satisfy the rule by taking preliminary steps without an ongoing, genuine intent to promptly proceed to trial, as might be evident from subsequent inexcusable delays. Finally, the 180-day period is a fixed period of consecutive days; a court should not calculate the period by allocating only the number of days' delay attributable to the prosecutor, although the reasons underlying specific periods of delay might be otherwise relevant to a court's determination of whether action was in good faith commenced during the requisite period.

In this case, the prosecution commenced action to bring defendant to trial well within the 180-day period, was actually ready to proceed to trial during this period, and remained ready to proceed with the trial at all times thereafter. Further, the record reflects no evidence of subsequent inexcusable delays under the facts of this case. Indeed, defendant requested or consented to most of the adjournments. Therefore, the trial court was not deprived of personal jurisdiction for the purpose of adjudicating the home invasion charge against defendant.

Accordingly, we affirm the result reached by both lower courts and the judgment of the Court of Appeals.

YOUNG, C.J., and MARKMAN and HATHAWAY, JJ., concurred with CORRIGAN, J.

MARILYN KELLY, J. (*dissenting*). I would reverse the judgment of the Court of Appeals. I believe that compliance with the 180-day rule established by MCL

780.131 and MCL 780.133 requires more than a prosecuting attorney's good-faith effort to promptly bring an inmate to trial. I would hold that the statutory rule requires an inmate actually to be brought to trial within 180 days.

JURISDICTION UNDER THE 180-DAY RULE

I agree with the majority that the 180-day rule is jurisdictional. This is clear from the language of MCL 780.133, which states:

> In the event that, within the time limitation set forth in [MCL 780.131], action is not commenced on the matter for which request for disposition was made, *no court of this state shall any longer have jurisdiction thereof* . . . . [Emphasis added.]

Thus, if "action is not commenced" within 180 days, as set forth in MCL 780.131, the court is divested of jurisdiction.

I further agree with the majority that MCL 780.133 presents an issue of personal, rather than subject-matter, jurisdiction. Therefore, I concur in the majority's adoption of Justice BOYLE's analysis on this issue.[1] Notably, if the 180-day rule concerned subject-matter jurisdiction, noncompliance with the rule would not be waivable.[2] Yet it must be waivable, at least when a defendant asserts certain constitutional rights. Were the statute viewed as preventing defense-initiated adjournments, the constitutional rights of the defendant might well be violated.

---

[1] *People v Smith*, 438 Mich 715, 724-725; 475 NW2d 333 (1991) (BOYLE, J., concurring in the result), overruled on other grounds by *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006).

[2] See *United States v Cotton*, 535 US 625, 630; 122 S Ct 1781; 152 L Ed 2d 860 (2002) (stating that subject matter jurisdiction "can never be forfeited or waived").

Therefore, interpreting the 180-day rule as referring to subject-matter jurisdiction would potentially render the entire statute unconstitutional. And it is a fundamental rule of statutory interpretation that if two constructions are possible, one constitutional and one unconstitutional, the constitutional construction should be adopted.[3] It follows that the 180-day rule is jurisdictional only with regard to personal jurisdiction, which is waivable by a defendant.

I agree with the majority that the 180-day rule divests a court of personal jurisdiction over a defendant if "action is not commenced" within 180 days of the required notice from the Department of Corrections (DOC). My disagreement regards three matters: (a) the calculation of the 180 days, (b) the type of "action" that must be commenced within the statutory time limit, and (c) the precedential effect of *People v Hendershot*.[4] I address each of these in turn.

CONSTRUING AND ATTRIBUTING DELAY UNDER THE 180-DAY RULE

The majority claims that, in calculating the 180-day period, identifying the source of periods of pretrial delay is not necessary. It believes that such a practice was imported improperly into 180-day-rule jurisprudence from caselaw dealing with the constitutional right to a speedy trial. I disagree the importation was improper. It is true that, when determining whether a defendant's constitutional right to a speedy trial has been violated, the "reason for the delay" is one of the factors taken

[3] *Ford Motor Co v State Tax Comm*, 400 Mich 499, 518; 255 NW2d 608 (1977) (WILLIAMS, J., dissenting), citing *State Bar of Mich v City of Lansing*, 361 Mich 185, 195; 105 NW2d 131 (1960).

[4] *People v Hendershot*, 357 Mich 300; 98 NW2d 568 (1959).

into account.[5] However, the allocation of pretrial delay is a necessary corollary of the 180-day rule, as well. Even though the rule does not expressly require a day count and assignment of responsibility for periods of delay, both requirements are implicit in the statute.

MCL 780.131 specifically states the number of days that may pass between the time the DOC certifies notice and the time the defendant must be brought to trial. The specification in the statute of a set number of days implies that a day count is necessary. Furthermore, one must ascribe responsibility for the periods of delay in order to determine which the defendant caused, and thus waived.

A violation of the 180-day rule divests a court of personal jurisdiction. Significantly, only a defendant may waive application of the rule. A prosecutor's good-faith efforts to prepare for trial or even a trial court's order to adjourn trial may not waive it. Thus, when it comes to attributing pretrial delay, the majority is correct that it is unnecessary to attribute delay to the prosecutor. The more pertinent inquiry is whether a period of delay may be attributed to and then waived by the defendant.

When a defendant requests an adjournment, the delay occasioned by the adjournment should be attributed to the defendant and not considered when calculating the 180 days that the statute allots. This is because, in requesting an adjournment, a defendant is effectively waiving that period of delay. But by request-

[5] Four factors to be balanced when determining whether a defendant's constitutional right to a speedy trial has been violated are: the " '[l]ength of delay, the reason for the delay, the defendant's assertion of his right and prejudice to the defendant.' " *People v Collins*, 388 Mich 680, 687-688; 202 NW2d 769 (1972), quoting *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972).

ing or consenting to a delay, a defendant is not forfeiting the rule requiring action to commence within 180 days; he or she is not forever relinquishing the totality of his or her rights under the 180-day rule. This would have the undesirable effect of permitting a court or prosecutor to delay for an indefinite amount of time after a defendant knowingly requests an adjournment. Rather, by requesting or consenting to a certain period of delay, a defendant is waiving that specific period of delay. Effectively, a defendant may toll the 180-day period.

Hence, any delay that the court grants and that the defendant consents to must not contribute to the 180 days allotted. This interpretation is necessary because defendants cannot be permitted to deliberately create periods of delay and then use those periods to argue that they were denied their statutory right to a speedy trial. On the other hand, a delay attributable to a person or entity other than a defendant cannot be excepted from the 180-day period. Hence, when a trial is unreasonably delayed for reasons outside a defendant's control, the length of the delay should be counted when calculating whether 180 days have elapsed. Examples are adjournments requested by the prosecution and those caused by a judge because of docket congestion. If 180 days of delay not attributable to a defendant transpire and "action" has not yet commenced, the court is divested of jurisdiction to try the charge.

THE "ACTION" REQUIRED BY THE 180-DAY RULE

In 1959, in the case of *People v Hendershot*, this Court held that MCL 780.131 allowed the 180-day period to be exceeded if "apparent good-faith action is taken well within the period and the people proceed promptly and with dispatch thereafter toward readying

the case for trial . . . ."[6] The majority rallies behind this interpretation of the 180-day rule. However, the wording of MCL 780.131 and MCL 780.133 does not support it.

The relevant portion of MCL 780.131 provides:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, *the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney* of the county in which the warrant, indictment, information, or complaint is pending *written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint*. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail. [Emphasis added.]

Thus, the statute requires that an inmate with pending criminal charges "shall be brought to trial within 180 days after" the DOC delivers written notice of the inmate's imprisonment to the prosecuting attorney. The use of the word "shall" indicates a mandatory and imperative directive.[7]

The penalty for failure to comply with this statutory mandate is set forth in MCL 780.133:

---

[6] *Hendershot*, 357 Mich at 304.

[7] *Oakland Co v State*, 456 Mich 144, 154; 566 NW2d 616 (1997).

> In the event that, within the time limitation set forth in [MCL 780.131], *action is not commenced on the matter for which request for disposition was made*, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice. [Emphasis added.]

Thus, if "action is not commenced" within 180 days, as set forth in MCL 780.131, the court is divested of jurisdiction.

Contrary to the majority's approach, I question the need to go beyond the words in the statute and the need to consult a dictionary to discern the Legislature's intended meaning of commencing "action." MCL 780.131 mandates that the inmate be "brought to trial" within 180 days, and MCL 780.133 divests the court of jurisdiction over the untried warrant, indictment, information, or complaint when "action is not commenced on the matter" within 180 days. Read together, MCL 780.131 and MCL 780.133 indicate that the "action" to be commenced within 180 days is "trial," not some undefined effort by the prosecutor or some preliminary proceeding leading to trial. To read the statutes otherwise would be to contradict the Legislature's mandate in MCL 780.131 that "the inmate shall be brought to trial within 180 days."

As the Court of Appeals has noted, "All questions concerning the 180-day rule begin and end with the statute, the key words of which are 'such inmate shall be brought to trial within 180 days.' Simply, this statute is mandatory and means that an inmate is entitled to a trial within 180 days."[8]

---

[8] *People v Wolak*, 153 Mich App 60, 64-65; 395 NW2d 240 (1986).

The majority admits that the 180-day rule consists of both MCL 780.131 and MCL 780.133. However, it ignores MCL 780.131 when interpreting the requirements of the rule and the punishment for noncompliance. Instead, relying on *Hendershot*, it holds that the statutes allow the 180-day period to be exceeded if " 'apparent good-faith action is taken well within the period and the people proceed promptly and with dispatch thereafter toward readying the case for trial[.]' "[9] But this strained interpretation is far disconnected from the language of the statute.

Not only does the majority's interpretation ignore the clear legislative mandate in MCL 780.131 that an inmate must be brought to trial within 180 days, it effectively adds nonexistent language to the statute. The text of the statute contains no reference to "good faith." The majority claims that good faith is not an "exception" to the 180-day rule. Rather, it asserts that good faith is an implicit requirement that the 180-day rule imposes on the prosecuting attorney; all that is required of the prosecuting attorney under the rule is a good-faith effort to bring the case to trial.

Good-faith efforts on behalf of the prosecution must be categorized as a judicially created exception to the 180-day rule, stemming from *Hendershot*. The 180-day rule requires a trial to begin within 180 days. Anything that allows a trial to be postponed beyond the 180 days allotted is necessarily an exception to the rule. No amount of rationalizing can change the fact that the Legislature wrote in no such exception.

The majority's interpretation is that if "apparent good-faith action is taken well within the period and the people proceed promptly and with dispatch thereafter

[9] *Ante* at 257, quoting *Hendershot*, 357 Mich at 304.

toward readying the case for trial, the condition of the statute for the court's retention of jurisdiction is met." This interpretation contains a second fundamental flaw: it places the burden of good-faith action solely on the prosecution, not on the trial court. Its practical effect is that the judge could indefinitely postpone trial in defiance of MCL 780.131 and MCL 780.133.

The scheduling of cases is within the sole discretion of the court. The prosecutor does not control it. Even if prosecuting attorneys do everything within their power to bring cases to trial, they cannot force courts to schedule trials within 180 days of notice. A court can delay any trial from commencing, citing docket congestion or other reasons. If this type of delay is not taken into account by the 180-day rule, an inmate could be forced to sit in prison indefinitely awaiting trial.

This problem is effectively illustrated by the procedural history of the instant case. The 180-day period relevant to this appeal began on July 23, 2006.[10] On the next scheduled trial date, September 16, 2006, defendant's recently appointed counsel requested an adjournment to allow him to prepare, and defendant agreed. The next scheduled trial date was November 28, 2006. On that date, defendant and counsel were present in court and prepared to proceed to trial. However, the court adjourned the case, and a new trial date of April 24, 2007, was set. There is no explanation in the record for the 147-day delay caused by this adjournment. On April 24, 2007, the court, on its own motion off the record, adjourned defendant's trial an additional 77 days, apparently because of docketing concerns. Next, a

[10] *Williams*, 475 Mich at 256 n 4 (holding that the 180-day period begins the day after the prosecuting attorney receives the written notice required by MCL 780.131).

new trial date was set for July 11, 2007. On that date, the case was adjourned 56 days to September 5, 2007. The court simply explained: "We've taken the time here to determine when this case is going to be reset and everybody is going to be available."

Thus, from November 28, 2006, to September 5, 2007, the court alone adjourned defendant's trial well in excess of 180 days. Yet the majority concludes that no violation of the 180-day rule occurred.

Under its interpretation and under *Hendershot*, as long as the prosecutor stands ready for trial, the court may adjourn a trial date as many times as it wishes. It need give no explanation for the length of the adjournments. Thus, even if no "action is commenced" for an indefinite time, a court may retain its jurisdiction over the matter, as long as there is some undefined good-faith effort by the prosecutor. This interpretation strips the 180-day requirement of any practical meaning. And it denies many inmates the legal recourse that the Legislature specifically provided them.

HENDERSHOT AND STARE DECISIS

The majority justifies its interpretation of the 180-day rule with the fact that this Court previously sanctioned such an interpretation in *Hendershot*. For the reasons I have described, I believe that *Hendershot* was wrongly decided. If an opinion is wrongly decided, we must apply the doctrine of stare decisis when deciding whether to overrule it. Our analysis always should begin with a presumption that upholding precedent is the preferred course of action.[11] That presumption should prevail

[11] *Petersen v Magna Corp*, 484 Mich 300, 317; 773 NW2d 564 (2009) (opinion by KELLY, C.J.).

unless effectively rebutted by the conclusion that a compelling justification exists to overturn it.[12]

In determining whether a compelling justification exists to overturn precedent, the Court may consider numerous evaluative criteria, none of which, standing alone, is dispositive. These criteria include, but are not limited to, whether (1) the precedent has proved to be intolerable because it defies practical workability, (2) reliance on the precedent is such that overruling it would cause a special hardship and inequity, (3) related principles of law have so far developed since the precedent was pronounced that no more than a remnant of it has survived, (4) facts and circumstances have so changed, or have come to be seen so differently, that the precedent no longer has significant application or justification, (5) other jurisdictions have decided similar issues in a different manner, (6) upholding the precedent is likely to result in serious detriment prejudicial to public interests, and (7) the prior decision was an abrupt and largely unexplained departure from then-existing precedent.[13]

First, I consider whether *Hendershot* has proved intolerable because it defies practical workability. I believe that this factor weighs strongly in favor of overruling *Hendershot*. Under *Hendershot*, it is unclear what constitutes a sufficient basis for a court to determine that the prosecution has acted in good faith to bring a defendant to trial. Making that determination requires an inherently subjective and effectively standardless inquiry. The answer may vary widely from judge to judge.

---

[12] *Id.*

[13] *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 303-304; 791 NW2d 897 (2010), citing *Adarand Constructors, Inc v Peña*, 515 US 200, 233-234; 115 S Ct 2097; 132 L Ed 2d 158 (1995).

What constitutes a good-faith effort in the eyes of one judge may not reach the mark in the eyes of another. For example, if a prosecutor delays trial for 180 days while diligently searching for a witness, is that sufficient good faith for a court to excuse the delay and retain jurisdiction? The answer is unclear. Further compounding the impracticability of *Hendershot* is the question of how a court is to make such a determination from the record. Whether a prosecutor has made good-faith efforts often will not be discernable from the record.

Hendershot contorted the 180-day rule into a confusing and ambiguous test. It left unclear what would constitute a prosecutor's good-faith efforts and when, if ever, the prosecutor's efforts would violate the 180-day rule. Ascertaining when a prosecutor should have been ready to proceed to trial will often be an insurmountable feat. Accordingly, *Hendershot* is innately unworkable.

Second, I consider whether reliance interests weigh in favor of upholding *Hendershot*. I conclude that this factor slightly favors upholding *Hendershot*. The Court decided that case more than 50 years ago, and there has been reliance on its holding. However, the reliance has been limited. Even after the *Hendershot* decision, Michigan courts have interpreted MCL 780.133 inconsistently, causing confusion about what must be done to prevent a court from losing jurisdiction over the defendant on the untried charge. For example, the Court of Appeals has held that the language of the 180-day rule requires an inmate to be brought to trial within 180 days.[14] Lang-

[14] *Wolak*, 153 Mich App at 64 ("All questions concerning the 180-day rule begin and end with the statute, the key words of which are 'such inmate shall be brought to trial within 180 days.' Simply, this statute is mandatory and means that an inmate is entitled to a trial within 180 days.").

uage from this Court has further compounded the confusion.[15]

Given that the caselaw on this issue is conflicting, a careful prosecutor or trial judge would not unconditionally rely on *Hendershot* as foolproof justification for delay in commencing a trial. Furthermore, MCL 780.131 unequivocally states that an inmate "shall be brought to trial within 180 days."

Third, I consider whether related principles of law have developed since *Hendershot* was decided that have undermined its authority. As I pointed out, both this Court and the Court of Appeals have held that the 180-day rule requires an inmate to be brought to trial within 180 days notwithstanding *Hendershot*.[16] Thus, subsequent caselaw has chipped away at the holding in *Hendershot*, undermining its authority.

Fourth, I consider whether facts and circumstances have so changed or have come to be seen so differently that *Hendershot* has been robbed of significant justification. I discern no factual or circumstantial changes that weigh for or against overruling *Hendershot*. Therefore, this factor is inapplicable to my analysis.

Fifth, I consider whether other jurisdictions have decided similar issues in a different manner. This factor also is inapplicable to my stare decisis analysis. Although other jurisdictions have statutorily supplemented the constitutional right to a speedy trial, the unique language of MCL 780.131 and MCL 780.133 renders other jurisdictions' interpretations of similar statutes unhelpful to our analysis.

---

[15] See *Williams*, 475 Mich at 252 ("MCL 780.133 requires dismissal with prejudice if a prisoner is not brought to trial within the 180-day time limit set forth in the act.").

[16] *Wolak*, 153 Mich App at 64; *Williams*, 475 Mich at 252.

Sixth, I consider whether upholding *Hendershot* is likely to result in serious detriment prejudicial to public interests. This factor weighs in favor of overruling *Hendershot*. It is in the public interest to see that those accused of crimes are timely brought to trial. It is also in the public interest that both the United States Constitution and the Michigan Constitution be upheld. And both guarantee the right to a speedy trial.[17] Accordingly, the Legislature has statutorily guaranteed an inmate's right to a speedy trial.

Moreover, the 180-day rule furthers the public interest by ensuring that sentences run concurrently when appropriate. " 'The purpose of the [180-day rule] is clear. It was intended to give the inmate, who had pending offenses not yet tried, an opportunity to have the sentences run concurrently consistent with the principle of law disfavoring accumulations of sentences.' "[18]

Despite the public's interest in seeing criminal charges disposed of in a timely manner, *Hendershot*'s holding permits criminal charges to remain untried for an indeterminate time. While ostensibly protecting an inmate's statutory right to a speedy trial, it leaves MCL 780.131 devoid of effect in many cases. Thus, *Hendershot* is detrimental to the public interests addressed by the 180-day rule.

Finally, I consider whether *Hendershot* represented an abrupt and largely unexplained departure from then-existing precedent. This factor is inapplicable to my stare decisis analysis because *Hendershot* was the first case to decide the issue. Thus, no precedent existed from which *Hendershot* could depart.

---

[17] US Const, Am VI; Const 1963, art 1, § 20.

[18] *Williams*, 475 Mich at 252, quoting and overruling on other grounds *People v Loney*, 12 Mich App 288, 292; 162 NW2d 832 (1968).

In summary, *Hendershot* (1) was wrongly decided, (2) defies practical workability, (3) has been undermined by subsequent caselaw, (4) would not cause a special hardship or inequity if overruled, and (5) has resulted in serious detriment prejudicial to public interests. Accordingly, I conclude that a compelling justification exists for overruling *Hendershot*.

CONCLUSION

The majority concludes that the 180-day rule is not violated if the prosecution takes some initial action to bring a defendant to trial, unless the action is followed by "inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly." The flaws in this interpretation are breathtaking. First, the interpretation ignores the clear language of MCL 780.131 that requires an inmate to be brought to trial within 180 days. Second, it imports language into MCL 780.133 that the Legislature never put there by giving a convoluted definition to the word "action." Third, it allows the trial judge to indefinitely delay a trial by citing docket congestion or other reasons.

The majority relies for its interpretation of the 180-day rule on the holding in *Hendershot*. However, *Hendershot* was wrongly decided, and compelling reasons exist to overturn it. I would overrule *Hendershot* and hold that the statutory 180-day rule requires that trial be commenced within 180 days of notice to the prosecution, excluding periods of delay that a defendant waived. Such a construction is faithful to the statutory language because it gives effect to the mandate of MCL 780.131 that an inmate be brought to trial within 180 days. In light of my analysis, I would reverse the Court of Appeals' judgment.

CAVANAGH, J., concurred with MARILYN KELLY, J.

MARY BETH KELLY, J. I do not participate in the decision of this case, which the Court considered before I assumed office, in order to avoid unnecessary delay to the parties. MCR 2.003(B) and (D)(3)(b).

KLOOSTER v CITY OF CHARLEVOIX

Docket No. 140423. Argued November 5, 2010 (Calendar No. 4). Decided March 10, 2011.

Nathan Klooster petitioned the Tax Tribunal for review of the city of Charlevoix's determination that a parcel of real property he owned had been transferred in a manner that lifted the cap placed on its taxable value by the 1994 amendment of Const 1963, art 9, § 3—better known as Proposal A—and required the reassessment of its taxable value under MCL 211.27a(3). The property had originally been acquired by petitioner's parents, as tenants by the entirety, by warranty deed in 1959. In August 2004, petitioner's mother quitclaimed her interest to petitioner's father, who thereafter quitclaimed the property to himself and petitioner as joint tenants with rights of survivorship. Petitioner became the sole owner of the property when his father died in January 2005. In September of that year, petitioner quitclaimed the property to himself and his brother as joint tenants with rights of survivorship. The reassessment at issue occurred in 2006 and was upheld by respondent's board of review. The Tax Tribunal affirmed the board of review, ruling that the death of petitioner's father had caused a transfer of ownership. Petitioner appealed. The Court of Appeals, BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ., reversed and remanded, holding that no transfer of ownership had occurred because, under MCL 211.27a(7)(h), petitioner's father was an original owner of the property before the joint tenancy was initially created. It further held that the vesting of the fee simple in petitioner caused by the death of petitioner's father was not a "conveyance" and therefore did not satisfy the definition of "transfer of ownership" in MCL 211.27a(6). 286 Mich App 435 (2009). The Supreme Court granted respondent's application for leave to appeal. 486 Mich 932 (2010).

In a unanimous opinion by Justice CAVANAGH, the Supreme Court *held*:

The termination of the joint tenancy caused by the death of petitioner's father was within the joint-tenancy exclusion from the definition of "transfer of ownership" under MCL 211.27a(7)(h) and therefore did not uncap the property for reassessment of its

taxable value. However, because the conveyance from petitioner to his brother that same year did not fall within the joint-tenancy exception, the Tax Tribunal correctly determined that the property had been uncapped, albeit for the wrong reason.

1. In 1994, Proposal A amended article 9, § 3 of the Michigan Constitution to limit tax increases on property as long as it remains owned by the same party, even though the actual market value of the property may have risen at a greater rate. When there has been a transfer of ownership as defined by Proposal A's enabling legislation, this cap on the property's taxable value is lifted, and the property must be reassessed pursuant to MCL 211.27a(3). Several transfers and conveyances are specifically excluded from this definition of "transfer of ownership," including the creation and termination of certain joint tenancies. Specifically, MCL 211.27a(7)(h) excludes transfers creating or terminating a joint tenancy between two or more people that meet two requirements: first, at least one of them was an "original owner" of the property before the joint tenancy was initially created and, second, if the property is held as a joint tenancy at the time of conveyance, at least one of the persons was a joint tenant when the joint tenancy was initially created and has remained a joint tenant since that time.

2. To determine who is an original owner of the property for purposes of the joint-tenancy exception from uncapping, one must first identify the most recent transfer of ownership that uncapped the property and then determine who owned the property as a result of that uncapping conveyance. The joint-tenancy exception provides that a joint owner at the time of the last transfer of ownership is an original owner. It also provides that a person is an original owner of property owned by that person's spouse. Accordingly, an original owner under the joint-tenancy exception may be (1) a sole owner at the time of the last uncapping event, (2) a joint owner at the time of the last uncapping event, or (3) the spouse of either a sole or joint owner of the property at the time of the conveyance at issue. The conveyance at issue is either the creation or the termination of a joint tenancy that may or may not uncap the property; it is not the preceding uncapping event used to determine who is an original owner of the property under MCL 211.27a(7)(h). If the conveyance at issue is the creation of a joint tenancy, it is important to determine whether the property is being conveyed from a previous joint tenancy or some other type of ownership estate. If the conveyance at issue is the termination of a joint tenancy, whether the joint tenancy being terminated is a successive joint tenancy is irrelevant. At the termination of a joint

tenancy, the identity of ownership before the creation of the joint tenancy is only relevant to determine whether the continuity of original ownership remains uninterrupted. In this case, because petitioner's father was an original owner, his conveyance of the property into a joint tenancy with himself as a cotenant did not uncap the property.

3. The termination of a joint tenancy occasioned by the death of the only other joint tenant is a conveyance for purposes of MCL 211.27a and does not require a written instrument beyond that which initially created the joint tenancy. MCL 211.27a(6) defines "transfer of ownership" as a "conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest." "Conveyance" is not statutorily defined, but is defined by a legal dictionary as (1) a voluntary transfer of a right or of property and (2) the transfer of a property right that does not pass by delivery of a thing or merely by agreement. Under the first definition, in the case of a joint tenancy with rights of survivorship, a voluntary transfer of a right or of property occurs when the joint tenancy is voluntarily created, transferring to the cotenants a joint life estate that gives the immediate right to possess and use the property as well as the last survivor's right to be vested with a fee simple. Under the second definition, the vesting of a fee simple at the moment of death in the last surviving cotenant is a transfer of a property right that does not pass by delivery of a thing.

4. The January 2005 conveyance effected by the death of petitioner's father was not a transfer of ownership that uncapped the property. The vesting of the fee simple in petitioner that occurred when his father died met the original-ownership requirement of MCL 211.27a(7)(h) because petitioner's father was a cotenant and was an original owner of the property before the joint tenancy was initially created. It also met the continuous-tenancy requirement because petitioner was a joint tenant when the joint tenancy was initially created in August 2004 and remained a joint tenant since that time. For purposes of the continuous-tenancy requirement, "when" refers to the moment in time when the joint tenancy was initially created.

5. The September 2005 conveyance from petitioner to himself and his brother as joint tenants was a transfer of ownership that uncapped the property, because petitioner was not an original owner of the property before the joint tenancy was initially created. The most recent event that would have been an uncapping event under Proposal A was the 1959 conveyance to petitioner's parents, and only they could qualify as original owners until the

next uncapping event. Because the August 2004 and January 2005 conveyances were not considered transfers of ownership under MCL 211.27a(7)(h), neither conveyance constituted an uncapping event, and petitioner did not acquire the status of an original owner. Therefore, respondent properly reassessed the property in 2006, and the Tax Tribunal reached the correct result, albeit for the wrong reason.

Reversed.

1. TAXATION — PROPERTY — CAPPING OF TAXABLE VALUE OF REAL PROPERTY — TRANSFERS OF OWNERSHIP — JOINT TENANCIES.

A transfer of ownership that creates or terminates a joint tenancy between two or more people does not lift the cap placed on the taxable value of the property by the 1994 amendment of Const 1963, art 9, § 3 (commonly called "Proposal A") if at least one of them was an original owner of the property before the joint tenancy was initially created and, if the property is held as a joint tenancy at the time of conveyance, at least one of them was a joint tenant when the joint tenancy was initially created and has remained a joint tenant since that time (MCL 211.27a[3], [6], [7][h]).

2. TAXATION — PROPERTY — CAPPING OF TAXABLE VALUE OF REAL PROPERTY — JOINT TENANCIES — CONVEYANCES.

The termination of a joint tenancy occasioned by the death of the only other joint tenant is a conveyance for purposes of MCL 211.27a and does not require a written instrument beyond that which initially created the joint tenancy to be considered a conveyance under that provision; however, the termination will not lift the cap placed on the taxable value of the property by the 1994 amendment of Const 1963, art 9, § 3 (commonly called "Proposal A") if the conveyance fits within the joint-tenancy exclusion from what constitutes a "transfer of ownership" found in MCL 211.27a(7)(h).

Law Weathers (by *Steven F. Stapleton*) for petitioner.

Young, Graham, Elsenheimer & Wendling, PC (by *James G. Young* and *Bryan E. Graham*), for respondent.

Amici Curiae:

Bill Schuette, Attorney General, *James J. Bursch*, Solicitor General, and *Steven B. Flancher* and *Ross H.*

Bishop, Assistant Attorneys General, for the State Tax Commission and the Department of Treasury.

Paul V. McCord, PLC (by *Paul V. McCord*), for the Taxation Section of the State Bar of Michigan.

Miller, Canfield, Paddock and Stone, P.L.C. (by *Steven D. Mann* and *Don M. Schmidt*), for the Michigan Municipal League, the Michigan Association of Equalization Directors, the Michigan Assessors Association, and the Michigan Townships Association.

CAVANAGH, J. This case involves the General Property Tax Act (GPTA)[1] and two particular circumstances in which a conveyance of property may or may not permit a taxing authority to "uncap" and reassess the value of that property. Specifically, we granted leave to appeal to address whether a "conveyance" as that term is used in MCL 211.27a(3) must be by means of a written instrument and whether, under MCL 211.27a(7)(h), petitioner's property was uncapped for purposes of property-tax reassessment by either the death of the other joint tenant in January 2005 or the creation of a subsequent joint tenancy in September 2005. *Klooster v City of Charlevoix*, 486 Mich 932 (2010). We hold first that a "conveyance" for purposes of MCL 211.27a does not require a written instrument. Second, we hold that while the January 2005 termination of the joint tenancy caused by the death of a cotenant was within the joint-tenancy exception created by MCL 211.27a(7)(h) and was thus not a transfer of ownership that uncapped the property, the September 2005 conveyance from petitioner to himself and his brother as joint tenants did uncap the property, because the conveyance did not fall within the joint-tenancy exception. Therefore, we reverse the judgment

[1] MCL 211.1 *et seq.*

of the Court of Appeals and hold that respondent, the city of Charlevoix, properly issued its 2006 notice of reassessment and that the Tax Tribunal reached the correct result, albeit for the wrong reason.

I. FACTS AND PROCEDURAL HISTORY

The facts are undisputed. In 1959, James and Dona Klooster acquired title to the subject property in the city of Charlevoix and held it as tenants by the entirety. On August 11, 2004, Dona quitclaimed her interest in the property to James, leaving James as the sole owner. On that same day, James quitclaimed the property to himself and his son, petitioner Nathan Klooster, as joint tenants with rights of survivorship. On January 11, 2005, James died, leaving petitioner as the sole property owner by operation of law. On September 10, 2005, petitioner quitclaimed the property to himself and his brother, Charles Klooster, as joint tenants with rights of survivorship.

In 2006, the assessor for the city of Charlevoix issued to petitioner and Charles Klooster a notice of assessment, taxable valuation, and property classification, indicating that, because of a transfer of ownership, the property's taxable value had been reassessed using the true cash value of the property. The notice did not state whether the termination of the joint tenancy caused by the death of petitioner's father in January 2005 or the September 2005 creation of the joint tenancy between petitioner and his brother constituted the transfer of ownership. As a result of the reassessment, the taxable value of petitioner's property increased from $37,802 to $72,300.

Petitioner appealed unsuccessfully to the city's board of review. Petitioner then appealed to the Tax Tribunal. The Tax Tribunal affirmed the reassessment, ruling

that the transfer of ownership to petitioner by virtue of his father's death was a conveyance for purposes of the GPTA. Additionally, the Tax Tribunal ruled that the joint-tenancy exception from MCL 211.27a(7)(h) did not apply to the January 2005 transfer because petitioner was not an original owner or an already existing joint tenant before the August 2004 joint tenancy was created. The Tax Tribunal did not rule on the September 2005 conveyance.

Petitioner appealed as of right in the Court of Appeals, claiming that the transfer of ownership caused by his father's death was not a conveyance and that even if it had been, petitioner would have qualified for the MCL 211.27a(7)(h) exception from uncapping. The Court of Appeals reversed the tribunal, determining that a "conveyance" requires a transfer of title by a written instrument, and thus James's death and the resulting transfer of fee title to petitioner by operation of law did not constitute a transfer of ownership under the GPTA that would uncap the property. *Klooster v City of Charlevoix*, 286 Mich App 435, 441-443; 781 NW2d 120 (2009). We granted respondent's application for leave to appeal. *Klooster*, 486 Mich at 932-933.

II. STANDARD OF REVIEW AND RULES OF STATUTORY INTERPRETATION

"In the absence of fraud, review of a decision by the Tax Tribunal is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle; its factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record." *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994).

Issues of statutory interpretation are questions of law that are reviewed de novo. *Brown v Detroit Mayor*,

478 Mich 589, 593; 734 NW2d 514 (2007). The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). "The words of a statute provide 'the most reliable evidence of its intent . . . .' " *Id.*, quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981). When construing a statute, a court must read it as a whole. *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010).

III. STATUTORY BACKGROUND

Resolving this case requires that we examine the January 2005 and September 2005 changes in the ownership of petitioner's property to determine whether respondent properly reassessed the property under the GPTA. We begin our analysis by briefly reviewing Proposal A and the GPTA before turning to the joint-tenancy exception and the specific conveyances at issue.

A. PROPOSAL A AND THE GPTA

In 1994, voters passed Proposal A, amending article 9, § 3 of the Michigan Constitution to limit the annual increase in property tax assessments and to authorize enabling legislation. The purpose of Proposal A was to limit tax increases on property as long as it remains owned by the same party, even though the actual market value of the property may have risen at a greater rate. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 12; 743 NW2d 902 (2008). The Michigan Legislature was charged with determining the specifics needed to give effect to Proposal A's mandate. See Const 1963, art 9, § 3 (providing for the reassessment of a parcel's value when ownership has been transferred

"*as defined by law*") (emphasis added). The 1995 amendments of the GPTA[2] fixed the cap on assessment increases at the lesser amount of either 5 percent of the assessed value of the property for the previous year or the increase in the rate of inflation from the previous year. MCL 211.27a(2). After certain "transfer[s] of ownership" occur, however, property becomes uncapped and thus subject to reassessment based on actual property value. MCL 211.27a(3).[3]

The GPTA defines "transfer of ownership" as a "conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest."[4] MCL 211.27a(6) provides a nonexhaustive list of examples of transfers of ownership, including conveyances by deed or by land contract and conveyances to or distributions from trusts. See MCL 211.27a(6)(a) through (j). From the definition of "transfer of ownership," however, MCL 211.27a(7) excludes 17 specific transfers and conveyances, including the one found in MCL 211.27a(7)(h), regarding the creation and termination of certain joint tenancies.

B. THE JOINT-TENANCY EXCEPTION: MCL 211.27a(7)(h)

The joint-tenancy exception from the definition of "transfer of ownership" provides that a transfer of ownership does not include

> [a] transfer creating or terminating a joint tenancy between 2 or more persons if at least 1 of the persons was an

---

[2] 1994 PA 415.

[3] MCL 211.27a(3) provides: "Upon a *transfer of ownership* of property after 1994, the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer." (Emphasis added.)

[4] MCL 211.27a(6).

> original owner of the property before the joint tenancy was initially created and, if the property is held as a joint tenancy at the time of conveyance, at least 1 of the persons was a joint tenant when the joint tenancy was initially created and that person has remained a joint tenant since the joint tenancy was initially created. A joint owner at the time of the last transfer of ownership of the property is an original owner of the property. For purposes of this subdivision, a person is an original owner of property owned by that person's spouse. [MCL 211.27a(7)(h).]

While this is not the simplest provision to understand at first reading, a careful deconstruction reveals its plain meaning. We begin by noting that MCL 211.27a(7)(h) establishes the requirements for excluding three types of conveyances from the definition of "transfer of ownership": (A) the termination of a joint tenancy, (B) the creation of a joint tenancy where the property was not previously held in a joint tenancy, and (C) the creation of a successive joint tenancy.[5]

Before examining the two requirements of the joint-tenancy exception, we must first take particular care to properly construe the terms "transfer of ownership" and "original owner." Additionally, when applying the joint-tenancy exception it is essential to focus on the particular conveyance that qualifies as the "conveyance at issue," especially if—as here—the parcel has been the subject of numerous conveyances, one or more of which may qualify as a transfer of ownership that uncaps the property. We discuss each of these terms in turn.

1. "TRANSFER OF OWNERSHIP"

For purposes of applying the joint-tenancy exception, the terms "transfer of ownership" and "uncapping

[5] See corresponding parts IV(A) through (C) of this opinion for discussions of these three types of conveyances under MCL 211.27a(7)(h).

event" are largely synonymous. The GPTA provides that "[u]pon a *transfer of ownership* of property . . . , the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer." MCL 211.27a(3) (emphasis added). Therefore, a transfer of ownership allows reassessment of the property based on its state equalized value, lifting the cap on the rate of increase provided by MCL 211.27a(2). A transfer of ownership thus uncaps the property. Conversely, any transaction listed in MCL 211.27a(7) is not a transfer of ownership that uncaps the property.

2. "ORIGINAL OWNER"

To determine who is an "original owner of the property" within the narrow context of the joint-tenancy exception, one must first identify the most recent transfer of ownership that uncapped the property and then determine who owned the property as a result of that uncapping conveyance. The joint-tenancy exception provides that "[a] joint owner at the time of the last transfer of ownership . . . is an original owner" and that "[f]or purposes of this subdivision, a person is an original owner of property owned by that person's spouse." MCL 211.27a(7)(h). There are thus three possibilities for who may constitute an "original owner" under the joint-tenancy exception: (1) a sole owner at the time of the last uncapping event,[6] (2) a joint owner at the time of the last uncapping event,[7] and (3) the

[6] While the statute does not specifically provide that a sole owner may be an original owner, this obvious result must follow, otherwise only a joint owner or the spouse of an owner could ever be considered an "original owner" for purposes of applying MCL 211.27a(7)(h).

[7] In the instant case, for example, the most recent uncapping event before the two 2005 conveyances at issue would have been in 1959, when

spouse of either a sole or joint owner of the property at the time of the conveyance at issue (i.e., the conveyance that may uncap the property). See *id.*

3. CONVEYANCE AT ISSUE

The "conveyance at issue" is either the creation or the termination of a joint tenancy that may or may not uncap the property for reassessment purposes.[8] The conveyance at issue, therefore, is not the preceding uncapping event used to determine who is an original owner of the property. If the conveyance at issue is the creation of a joint tenancy, it is important to determine whether the property is being conveyed from a previous joint tenancy or some other type of ownership estate when applying MCL 211.27a(7)(h). If the conveyance at issue is the termination of a joint tenancy, however, whether the joint tenancy being terminated is a successive joint tenancy is irrelevant under the MCL 211.27a(7)(h) analysis. At the termination of a joint tenancy, the identity of ownership before the creation of the joint tenancy is only relevant under the original-ownership requirement to ensure that the continuity of original ownership remains uninterrupted.

The conveyances at issue here, therefore, are the January 2005 and September 2005 conveyances because these are the conveyances that may or may not have uncapped the property.

James and Dona Klooster acquired title to the property, had Proposal A been in effect. Because James and Dona held the property in a tenancy by the entirety, they were "joint owner[s] at the time of the last [uncapping event]" and were thus "original owner[s] of the property."

[8] See MCL 211.27a(7)(h) (referring to "[a] transfer creating or terminating a joint tenancy"). The term "conveyance at issue" is not used in the statute, but we employ it here to assist in remaining focused on the pertinent conveyance when, as here, property has been conveyed multiple times.

4. THE ORIGINAL-OWNERSHIP AND CONTINUOUS-TENANCY REQUIREMENTS OF MCL 211.27a(7)(h)

The first sentence of MCL 211.27a(7)(h) establishes two requirements for satisfying the joint-tenancy exception, which we label to simplify analysis as the "original-ownership requirement" and the "continuous-tenancy requirement." The original-ownership requirement excludes "transfer[s] creating or terminating a joint tenancy between 2 or more persons if at least 1 of the persons was an original owner . . . before the joint tenancy was initially created" from being considered a "transfer of ownership." MCL 211.27a(7)(h). This requirement examines ownership of the property both before and after the conveyance at issue to ensure that continuity of original ownership bridges the transfer.

The continuous-tenancy requirement provides that "if the property is held as a joint tenancy at the time of conveyance, at least 1 of the persons was a joint tenant when the joint tenancy was initially created and that person has remained a joint tenant since the joint tenancy was initially created." *Id.* Because of the conditional language "if the property is held as a joint tenancy at the time of conveyance," this requirement applies only to conveyances terminating a joint tenancy and conveyances creating a successive joint tenancy.[9] Because it pertains to the continuous tenancy of at least one of the joint tenants from the time a particular joint tenancy was created until the time of its termination, the continuous-tenancy requirement is entirely retrospective.

[9] By using the term "successive joint tenancy," we refer only to transfers conveying property from one joint tenancy directly into another joint tenancy.

IV. APPLYING THE JOINT-TENANCY EXCEPTION

All parties agree that the August 2004 conveyance from the father, James Klooster, to himself and petitioner as joint tenants with rights of survivorship was not an uncapping event because MCL 211.27a(7)(h) excludes such conveyances from the definition of "transfer of ownership." Because James did not hold the property in a joint tenancy before creating the joint tenancy with petitioner, the continuous-tenancy requirement of MCL 211.27a(7)(h) was inapplicable. Under the original-ownership requirement of MCL 211.27a(7)(h), James Klooster "was an original owner of the property before the [August 2004] joint tenancy was initially created." James acquired the status of an original owner as a result of the 1959 conveyance to James and Dona because the 1959 conveyance was the most recent "transfer of ownership" that uncapped the property.[10] Put simply, under the joint-tenancy exception, an original owner may convey property into a joint tenancy without uncapping the property, provided the original owner is also a cotenant in the resulting joint tenancy.

We turn now to conveyances under the GPTA.

A. TERMINATIONS OF JOINT TENANCIES

When petitioner's father died in January 2005, the joint tenancy terminated by operation of law, vesting petitioner with sole ownership. We first examine whether the change in the nature of the ownership of

[10] We of course recognize that Proposal A was not enacted until 1994, well after the 1959 conveyance. Under Proposal A, however, the 1959 conveyance would have qualified as a transfer of ownership because, as the deed indicates, neither James nor Dona owned the property before purchasing it from Althea Ward.

the property occasioned by the death of the only other joint tenant is even a conveyance, as that term is used in the GPTA.

1. CONVEYANCES UNDER THE GPTA

The Court of Appeals held that the vesting of sole ownership was not a conveyance because there was no written instrument. *Klooster*, 286 Mich App at 442. This was error. As we will explain, the termination of a joint tenancy occasioned by the death of the only other joint tenant is a conveyance under the GPTA and does not require a written instrument beyond that which initially created the joint tenancy.[11]

When one of only two joint tenants dies, an estate in land passes by operation of law to the survivor. This Court has described a joint tenancy with rights of survivorship as a joint life estate with a dual contingent remainder that vests the fee simple in whichever cotenant outlives the others. *Albro v Allen*, 434 Mich 271, 274-275; 454 NW2d 85 (1990). A contingent remainder is "[a] remainder that is either given to an unascertained person or made subject to a condition precedent." Black's Law Dictionary (9th ed), p 1405. The contingent remainder is thus created simultaneously with the creation of the joint tenancy with rights of survivorship and " 'waits patiently' for possession." *Id.*, quoting Bergin & Haskell, Preface to Estates in Land and Future Interests (2d ed), p 73. In the case of a joint tenancy with rights of survivorship, the contingency is surviving the cotenants, and at the moment of death, the decedent's interest in the property passes to the survivor or survivors. *Albro*,

[11] As we will discuss, however, a conveyance will not constitute a transfer of ownership under the GPTA if excluded under MCL 211.27a(7)(a) through (q).

434 Mich at 274-275. When there is only one remaining joint tenant, the contingent remainder vests in the survivor a fee simple in the property. See *id.*

The interest that passes to the last survivor in a joint tenancy is likewise a conveyance under the GPTA. The GPTA defines "transfer of ownership" as a "*conveyance* of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest." MCL 211.27a(6) (emphasis added). While the statute uses the word "conveyance," it does not define it, and we may therefore consult a dictionary. *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n,* 456 Mich 590, 604; 575 NW2d 751 (1998). The relevant dictionary definitions of "conveyance" include (1) "[a] voluntary transfer of a right or of property" and (2) "[t]he transfer of a property right that does not pass by delivery of a thing or merely by agreement." Black's Law Dictionary (8th ed).[12] Under the first definition, in the case of a joint tenancy with rights of survivorship, the "voluntary transfer of a right or of property" occurs when the joint tenancy is voluntarily created, transferring to the cotenants a joint life estate that gives the immediate right to possess and use the property as well as the last survivor's right to be vested with a fee simple. See *Albro*, 434 Mich at 274-275. The conveyance occasioned by the death of the only other cotenant fits the second definition as well, because the vesting of a fee simple at the moment of death in the last surviving cotenant is a

[12] We recognize that the definitions of "conveyance" include the document itself. See definition 4 in Black's Law Dictionary (9th ed). However, we believe that a document such as a deed is a memorialization of the property interest being conveyed, not the conveyance itself, under the GPTA.

"transfer of a property right that does not pass by delivery of a thing . . . ." Therefore, the interest that passes to the last survivor in a joint tenancy is a conveyance under the GPTA.

In holding that there was no conveyance absent a writing, the Court of Appeals erred by relying on the act-specific definitions of a "conveyance" in MCL 565.35[13] and in *McMurtry v Smith*, 320 Mich 304, 307; 30 NW2d 880 (1948). *Klooster*, 286 Mich App at 441-442. First, the definition of "conveyance" in MCL 565.35 is limited by the language "as used in this chapter," and MCL 211.27a is not in chapter 565 of the Michigan Compiled Laws.[14] Second, *McMurtry* involved the recording of a supplement to a plat, and it was thus appropriate for the *McMurtry* Court to rely on the definition of "conveyance" in the statutory predecessor of MCL 565.35 because from its inception and regardless of where in the statutes it has been compiled, the chapter at issue has embraced the recording statutes, and the recording of interests in real property necessarily includes the use of some written instrument.[15] Neither of these definitions of "conveyance," however, mandates the conclusion that there can be no conveyance without a writing under the GPTA.

---

[13] MCL 565.35 provides, in relevant part: "The term 'conveyance,' as used in this chapter, shall be construed to embrace every instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged or assigned . . . ."

[14] In the statute's first incarnation, "this chapter" referred to chapter 65 of the Revised Statutes of 1846. The provision remained the same through numerous compilations and eventually was compiled in the first part of chapter 565 of the Michigan Compiled Laws, specifically MCL 565.1 through 565.49. It is not completely clear whether "this chapter" now refers to all of chapter 565 or only that portion corresponding to chapter 65 of the Revised Statutes of 1846.

[15] See 1929 CL 13309, designated in the 1948 Compiled Laws and subsequent compilations as MCL 565.35.

Other examples of transfers of ownership in MCL 211.27a illustrate that the definition of "conveyance" in MCL 565.35 is inconsistent with the meaning of "conveyance" in the GPTA. Conveyances to a trust, distributions from a trust, and conveyances by intestate succession do not require any written instrument at the time of the transfer, yet all are transfers of ownership that will uncap property. See MCL 211.27a(6)(c), (d) and (f). Therefore, the plain text of MCL 211.27a indicates that the Legislature did not intend that conveyances must be effected by means of a written instrument for purposes of the GPTA.

In sum, therefore, we conclude that the vesting of a fee simple in the last surviving cotenant of a joint tenancy with rights of survivorship is a "conveyance" for purposes of the GPTA and requires no additional writing beyond that which created the joint tenancy. Whether this conveyance is a transfer of ownership that uncaps the property is a separate issue.

2. THE JANUARY 2005 CONVEYANCE

The GPTA defines "transfer of ownership" as a "conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest." MCL 211.27a(6). Unless an applicable exception exists, the interest that vests in the last survivor in a joint tenancy with rights of survivorship *would* constitute a transfer of ownership because the fee simple that vests in the survivor is a "conveyance of title . . . , the value of which is substantially equal to the value of the fee interest." *Id.*

With regard to *terminations* of joint tenancies, MCL 211.27a(7) provides that a transfer of ownership does not include

> [a] transfer . . . terminating a joint tenancy between 2 or more persons if at least 1 of the persons was an original owner of the property before the joint tenancy was initially created and, if the property is held as a joint tenancy at the time of conveyance, at least 1 of the persons was a joint tenant when the joint tenancy was initially created and that person has remained a joint tenant since the joint tenancy was initially created.

In this context, the conveyance at issue is the termination of the joint tenancy because that is the event that may or may not uncap the property. In order for the termination of a joint tenancy to be exempted from uncapping, the original-ownership requirement mandates that at least one of the joint tenants in the joint tenancy being terminated was an original owner of the property before the joint tenancy was initially created. And, under the continuous-tenancy requirement, at least one of the persons in the joint tenancy being terminated must have been "a joint tenant *when* the joint tenancy was initially created," and that person must have "remained a joint tenant since the joint tenancy was initially created." *Id.* (emphasis added).

Here lies the critical point of contention in this case. Petitioner argues that "when" refers to that point in time at which the joint tenancy was created—not before—and that because petitioner was a joint tenant *as a result of* the creation of the joint tenancy at that point in time, he satisfies the requirement. Respondent argues that this use of "when" means that at least one of the persons in the joint tenancy must have also been a joint tenant in an immediately preceding joint tenancy. Because the father held the property in sole ownership, respondent argues, neither petitioner nor his father were joint tenants "when the joint tenancy was initially created." Essentially, respondent argues that the joint-tenancy exception applies

only to successive joint tenancies.[16] Respondent thus reads "when" to mean "before." We disagree.

The adverb "when" refers to a distinct point in or period of time. See *The American Heritage Dictionary, Second College Edition* (1982) (defining "when" as "[a]t the time that" and "during the time at which"). "When" is not complete in itself, however, and requires some contextual referent to the event or period of time to which it applies. As "when" is used in the joint-tenancy exception, it is not durational; it refers to the moment in time "when the joint tenancy was initially created . . . ." MCL 211.27a(7)(h). At that moment, each cotenant acquired the status of a joint tenant by virtue of the instrument creating the joint tenancy. Had the Legislature meant to say "before," it would have done so, as it did earlier in the joint-tenancy exception (i.e., "if at least 1 of the persons was an original owner of the property *before* the joint tenancy was initially created"). *Id*. (emphasis added).

We hold, therefore, that as applied to terminations of joint tenancies, the plain text of MCL 211.27a(7)(h) does not apply only to successive joint tenancies. For purposes of applying the continuous-tenancy requirement of the joint-tenancy exception, a person who becomes a joint tenant as a result of a conveyance is "a joint tenant when the joint tenancy was initially created." We can now apply the joint-tenancy exception to the January 2005 conveyance.

---

[16] Holding that the MCL 211.27a(7)(h) exception in the context of terminations applies only to successive joint tenancies would read an additional requirement into the statute and establish a pointless procedural mandate. In the instant case, for example, under the erroneous successive-joint-tenancy interpretation, had James and Dona Klooster transferred the property from a tenancy by the entirety into a joint tenancy before creating a successive joint tenancy between James and petitioner, the property would not have been uncapped by the death of James. There is no indication that the Legislature intended to benefit only those taking such elaborate steps.

The vesting of the fee simple in petitioner that occurred as a result of the death of James Klooster met the original-ownership requirement of MCL 211.27a(7)(h) because James Klooster was a cotenant and "was an original owner of the property before the joint tenancy was initially created." Because the property was held as a joint tenancy at the time of the conveyance, we must also apply the continuous-tenancy requirement that "at least 1 of the persons was a joint tenant when the joint tenancy was initially created and that person has remained a joint tenant since the joint tenancy was initially created." As explained, because petitioner was a joint tenant "when" James initially created the joint tenancy in August 2004 and "remained a joint tenant since the joint tenancy was initially created"—until the joint tenancy terminated—the January 2005 conveyance was not a transfer of ownership under MCL 211.27a(7)(h).

We therefore hold that the January 2005 conveyance did not uncap the property. As we will explain, however, the September 2005 conveyance was a transfer of ownership that did uncap the property.

B. CREATION OF A NONSUCCESSIVE JOINT TENANCY

When petitioner conveyed the property to himself and his brother in September 2005, the property went from a state of sole ownership into a new joint tenancy. Before applying the joint-tenancy exemption to the September 2005 conveyance, however, we first address preservation of the issue.

1. PRESERVATION

Our order granting leave to appeal asked the parties to address preservation of the September 2005 conveyance as a possible uncapping event. See MCR

7.302(H)(4)(a) (limiting appeals to issues raised in an application "[u]nless otherwise ordered"); MCR 7.316(A)(3) (allowing this Court to "permit the reasons or grounds of appeal to be amended or new grounds to be added").

We note first that the fact of the September 2005 conveyance has always been part of the record on which this case was decided below and that the notice of reassessment in evidence was addressed to both petitioner and Charles Klooster. That the Tax Tribunal and the Court of Appeals chose to focus only on the January 2005 conveyance occasioned by the death of James Klooster does not remove these facts from evidence. In addition, the preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when " 'necessary to a proper determination of a case . . . .' " *Prudential Ins Co of America v Cusick*, 369 Mich 269, 290; 120 NW2d 1 (1963), quoting *Dation v Ford Motor Co*, 314 Mich 152, 160-161; 22 NW2d 252 (1946). Although this issue was not decided below, a party "should not be punished for the omission of the trial court." *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Lastly, an appellate court may uphold a lower tribunal's decision that reached the correct result, even if for an incorrect reason. See *Mulholland v DEC Int'l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989); *Peninsular Constr Co v Murray*, 365 Mich 694, 699; 114 NW2d 202 (1962).

We therefore find it appropriate to consider the September 2005 conveyance as a possible uncapping event because the facts are properly before us, the parties briefed and argued the issue in this Court, and doing so is necessary to a proper determination of this case.

2. THE SEPTEMBER 2005 CONVEYANCE

In September 2005, petitioner—who held the property in sole ownership as a result of the January 2005 vesting of the fee simple—conveyed the property to himself and his brother as joint tenants. In the context of the creation of a nonsuccessive joint tenancy, we need only consider the original-ownership requirement of MCL 211.27a(7)(h) because, as previously discussed, the continuous-tenancy requirement applies only if the property was held in a joint tenancy at the time of the conveyance. As applied to the creation of a nonsuccessive joint tenancy, the joint-tenancy exception provides that "[t]ransfer of ownership does not include . . . [a] transfer creating . . . a joint tenancy between 2 or more persons if at least 1 of the persons was an original owner of the property before the joint tenancy was initially created . . . ."

The September 2005 conveyance was not excluded from the definition of "transfer of ownership" in MCL 211.27a(6) because, under the original-ownership requirement, petitioner was not an "original owner of the property before the joint tenancy was initially created." MCL 211.27a(7)(h). As explained, the most recent event that would have been an uncapping event was the 1959 conveyance to petitioner's parents, James and Dona Klooster. *Only* James or Dona Klooster could qualify as an original owner until the time of the next uncapping event. Because the August 2004 and January 2005 conveyances were excluded by MCL 211.27a(7)(h) from the definition of "transfer of ownership," neither conveyance constituted an uncapping event and petitioner did not acquire the status of an original owner of the property. See MCL 211.27a(6). Because petitioner was not an original owner of the property before he initially created the joint tenancy with his brother, the Septem-

ber 2005 conveyance did not satisfy the joint-tenancy exception of MCL 211.27a(7)(h).[17] The September 2005 conveyance was therefore a transfer of ownership that uncapped the subject property.

Therefore, respondent properly issued the notice of assessment, taxable valuation, and property classification in 2006 because of a transfer of ownership in 2005, and the Tax Tribunal reached the correct result, albeit for the wrong reason.

C. CREATION OF SUCCESSIVE JOINT TENANCIES

Although not essential to resolving this case, we hope to provide some limited guidance by specifically addressing how MCL 211.27a(7)(h) *would* apply to the creation of a successive joint tenancy. If the property was held in joint tenancy before the conveyance *creating* a successive joint tenancy, the original-ownership requirement mandates that there must have been an "original owner of the property" before the joint tenancy was initially created who is also a joint tenant in the successive joint tenancy. The continuous-tenancy requirement pertains to the immediately preceding joint tenancy and requires that at least one of the persons in the previous joint tenancy must have been "a joint tenant when the [previous] joint tenancy was initially created," and that same person must have "remained a joint tenant since the [previous] joint tenancy was initially created."

---

[17] We note, however, that both petitioner and Charles Klooster now qualify as original owners of the property for purposes of MCL 211.27a(7)(h) because each is a joint owner and "[a] joint owner at the time of the last transfer of ownership of the property is an original owner of the property." Because it uncapped the property, the September 2005 conveyance was a "transfer of ownership" under MCL 211.27a(6).

V. CONCLUSION

We reverse the judgment of the Court of Appeals and hold first that a "conveyance" for purposes of MCL 211.27a need not be by means of a written instrument. We hold also that while the January 2005 conveyance to petitioner of a fee simple was excluded by MCL 211.27a(7)(h) from the GPTA's definition of "transfer of ownership," the September 2005 conveyance from petitioner to himself and his brother in joint tenancy was not exempted from uncapping, and therefore respondent city of Charlevoix properly issued the notice of assessment, taxable valuation, and property classification in 2006. Therefore, we reinstate the decision of the Tax Tribunal because it reached the correct result, albeit for an incorrect reason.

YOUNG, C.J., and MARILYN KELLY, MARKMAN, HATHAWAY, MARY BETH KELLY, and ZAHRA, JJ., concurred with CAVANAGH, J.

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Leave to Appeal Denied September 8, 2010:

WILHELMI v BRADFORD, No. 141468; Court of Appeals No. 297468.

Summary Disposition September 9, 2010:

PEOPLE v NATHAN JACOBS, No. 139607; Court of Appeals No. 283056. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that portion of the judgment of the Court of Appeals that denied the defendant's newly discovered evidence claim, and we remand this case to the Court of Appeals for reconsideration of that claim in light of the laboratory report from Ron Smith & Associates, Inc. The motion for remand to the trial court is denied. We do not retain jurisdiction.

HANDLEY v CITY OF ANN ARBOR, No. 140046; Court of Appeals No. 284135. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we affirm the result reached by the Court of Appeals in light of our decision in *Robinson v City of Lansing*, 486 Mich 1 (2010), which held that the "two-inch rule" of MCL 691.1402a applies only to "county" highways. Given that the city has admitted that it owns the section of sidewalk at issue, there is no apparent dispute in this case that the road at issue is not a "county" highway. Therefore, in light of our decision in *Robinson*, the two-inch rule does not apply to this case. We thus vacate the Court of Appeals opinion because its analysis is dictum given our determination in *Robinson* that MCL 691.1402a applies only to "county" highways. We remand this case to the Washtenaw Circuit Court for further proceedings consistent with this order and *Robinson*. We do not retain jurisdiction.

PEOPLE v JAMISON, No. 140905; Court of Appeals No. 295965. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Chippewa Circuit Court for the ministerial correction of the judgment of sentence to reflect, in accordance with the plea agreement, the dismissal of the habitual offender, second offense, supplement under MCL 769.10. The original judgment of sentence and its two amended versions inaccurately indicate that the defendant was subject to sentence enhancement under MCL 769.10. We further order the trial court to ensure that the corrected judgment of sentence is transmitted to the Department of Corrections. In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. We do not retain jurisdiction.

Leave to Appeal Denied September 9, 2010:

PEOPLE v JAKAJ, No. 137866; Court of Appeals No. 286156.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

SHAW v CITY OF ECORSE, Nos. 138774 and 138775; reported below: 283 Mich App 1.

PEOPLE v WITHERSPOON, No. 139383; Court of Appeals No. 292216.

PEOPLE v ROBERT REED, No. 139651; Court of Appeals No. 283677.

PEOPLE v SONYA O'NEAL, No. 139693; Court of Appeals No. 283676.

PEOPLE v GONZALEZ, No. 140123; Court of Appeals No. 292869.

PEOPLE v RICHARDSON, No. 140256; Court of Appeals No. 293281.

PEOPLE v KISSNER, No. 140274; Court of Appeals No. 293022.

PEOPLE v ANTHONY JONES, No. 140303; Court of Appeals No. 293725.

PEOPLE v NIXON, No. 140403; Court of Appeals No. 293476.

PEOPLE v CRAWFORD, No. 140441; Court of Appeals No. 291330.

PEOPLE v PERRY, No. 140457; Court of Appeals No. 293128.

PEOPLE v SCHUH, No. 140463; Court of Appeals No. 294868.

PEOPLE v SPAN, No. 140464; Court of Appeals No. 294191.

PEOPLE v TYRONE MOORE, No. 140479; Court of Appeals No. 294447.

PEOPLE v RUTKOFSKE, No. 140495; Court of Appeals No. 285753.

FEYZ v MERCY MEMORIAL HOSPITAL, Nos. 140582 and 140583; Court of Appeals Nos. 285880 and 289226.

PEOPLE v SHELTON, No. 140602; Court of Appeals No. 294379.

PEOPLE v JOSHUA JONES, No. 140606; Court of Appeals No. 293988.

PEOPLE v WAGNER, No. 140642; Court of Appeals No. 294798.

PEOPLE v JOSEPH DIXON, No. 140652; Court of Appeals No. 294880.

PEOPLE v CHARLES DAVIS, No. 140663; Court of Appeals No. 294636.

PEOPLE v STANLEY MILLER, No. 140682; Court of Appeals No. 295528.

WEICHUHN v CATHOLIC DIOCESE OF LANSING, No. 140686; reported below: 287 Mich App 211.

PEOPLE v ERVIN, No. 140697; Court of Appeals No. 293620.

PEOPLE v TOWNSEND, No. 140717; Court of Appeals No. 288389.

PEOPLE v MARQUIS JENKINS, No. 140729; Court of Appeals No. 295547.

PEOPLE v PONDER, No. 140772; Court of Appeals No. 281671.

PEOPLE v BRADY SMITH, No. 140777; Court of Appeals No. 295399.

PEOPLE v WENGOROVIUS, No. 140790; Court of Appeals No. 295846.

CITIZENS FOR ENVIRONMENTAL INQUIRY v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 140804; Court of Appeals No. 286773.

PEOPLE v CLAUDIO, No. 140870; Court of Appeals No. 295320.

PEOPLE v RODERICK TOLBERT, No. 140871; Court of Appeals No. 288017.

PEOPLE v VERNICE ROBINSON, No. 140876; Court of Appeals No. 294601.

PEOPLE v CONNELL HOWARD, No. 140877; Court of Appeals No. 294877.

SHERR v WEST BLOOMFIELD TOWNSHIP, No. 140881; Court of Appeals No. 290386.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

MASTERS v MASTERS, No. 140883; Court of Appeals No. 294801.

HARRIS v DETROIT PUBLIC SCHOOLS, No. 140888; Court of Appeals No. 283472.

MACKIE v BOLLORE SA, No. 140895; Court of Appeals No. 286461.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

FERGEANU v COURT OF APPEALS CLERK, No. 140898; Court of Appeals No. 295075.

PEOPLE v ANDREW BREEDING, No. 140906; Court of Appeals No. 291554.

DILLARD v FARM BUREAU GENERAL INSURANCE COMPANY, No. 140926; Court of Appeals No. 288134.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v SHEPERD, No. 140941; Court of Appeals No. 296265.

DEXTROM v WEXFORD COUNTY, No. 140960; reported below: 287 Mich App 406.

PEOPLE v FITZSIMONS, No. 140973; Court of Appeals No. 296047.

PEOPLE v WILLIAM HALL, No. 140979; Court of Appeals No. 294909.

PEOPLE v MITCHELL, No. 140981; Court of Appeals No. 296288.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v ANTHONY JORDAN, No. 140982; Court of Appeals No. 295171.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

ARMSTRONG v IOSCO TOWNSHIP, No.141006; Court of Appeals No. 288027.

SUMMIT POLYMERS, INCORPORATED v ATEK THERMOFORMING, INCORPORATED, No. 141011; Court of Appeals No. 289596.

LUBIENSKI v SCIO TOWNSHIP, Nos. 141012 and 141013; Court of Appeals Nos. 288727 and 288769.

PEOPLE v DAVIDSON, No. 141015; Court of Appeals No. 296569.

PEOPLE v JOEZELL WILLIAMS, No. 141017; Court of Appeals No. 295448.

PEOPLE v COUSINO, No. 141018; Court of Appeals No. 295921.

PEOPLE v MANZELLA, No. 141023; Court of Appeals No. 296443.

PEOPLE v CHARLES PAYTON, No. 141025; Court of Appeals No. 299440.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v REDDELL, No. 141030; Court of Appeals No. 296247.

PEOPLE v KYLES, No. 141035; Court of Appeals No. 295349.

MILFORD HOUSING, LLC v VILLAGE OF MILFORD, No. 141037; Court of Appeals No. 295113.

PEOPLE v MIZORI, No. 141038; Court of Appeals No. 286887.

PEOPLE v MICHAEL HOLMES, No. 141042; Court of Appeals No. 297027.

PEOPLE v JEREMIAH BROOKS, No. 141045; Court of Appeals No. 295878.

PEOPLE v JOHNSON, No. 141058; Court of Appeals No. 295751.

PEOPLE v ISOM, No. 141059; Court of Appeals No. 284857.

PEOPLE v KOCH, No. 141064; Court of Appeals No. 289948.

PEOPLE v HARRY WALTON, No. 141066; Court of Appeals No. 289212.

WHITEHORN v DEPARTMENT OF CORRECTIONS, No. 141067; Court of Appeals No. 294222.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v QUINTIN HOLMES, No. 141068; Court of Appeals No. 296457.

PEOPLE v NOONAN, No. 141074; Court of Appeals No. 296516.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v SEALS, No. 141075; Court of Appeals No. 296531.

PEOPLE v MATEO-CASTELLANOS, No. 141078; Court of Appeals No. 295633.

PEOPLE v DEMETRIUS HURD, No. 141082; Court of Appeals No. 294516.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v ANDRE HAMPTON, No. 141090; Court of Appeals No. 295109.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v DONTAY WILLIAMS, No. 141092; Court of Appeals No. 296488.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v LEE WHITE, No. 141097; Court of Appeals No. 296994.

PEOPLE v ELROY JONES, No. 141098; Court of Appeals No. 287734.

PEOPLE v WATKINS, No. 141099; Court of Appeals No. 296607.

PEOPLE v FARRAJ, No. 141100; Court of Appeals No. 295318.

PEOPLE v BROYLES, No. 141105; Court of Appeals No. 296593.

PEOPLE v TIMOTHY LOFTON, No. 141108; Court of Appeals No. 295970.

MICHIGAN CARDIOVASCULAR INSTITUTE v BAY REGIONAL MEDICAL CENTER, No. 141114; Court of Appeals No. 296314.

PEOPLE v LYVERE, No. 141115; Court of Appeals No. 296472.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v BRADY, No. 141120; Court of Appeals No. 289567.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v VANY, No. 141123; Court of Appeals No. 296689.

PEOPLE v BRYANT, No. 141125; Court of Appeals No. 282606.

PEOPLE v WILLIAM SEYMOUR, No. 141128; Court of Appeals No. 296570.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v TERRANCE SEYMOUR, No. 141130; Court of Appeals No. 296964.

PEOPLE v BRIAN JOHNSON, No. 141131; Court of Appeals No. 293566.

PEOPLE v TERRANCE SEYMOUR, No. 141132; Court of Appeals No. 296965.

PEOPLE v CLINTON WHEELER, No. 141133; Court of Appeals No. 289331.

TURKETTE v TURKETTE, No. 141134; Court of Appeals No. 287695.

CITY OF DETROIT v CROWN ENTERPRISES, INCORPORATED, Nos. 141135 and 141136; Court of Appeals Nos. 285258 and 288429.

PEOPLE v OWENS, No. 141140; Court of Appeals No. 288668.

PEOPLE v SPARKS, No. 141141; Court of Appeals No. 281997.

PEOPLE v JOHN RAY, No. 141142; Court of Appeals No. 295244.

DAVIS, J.,not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v ROBERT GREEN, No. 141144; Court of Appeals No. 295912.

PEOPLE v HOLCOMB, No. 141145; Court of Appeals No. 291540.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v MARK ROWE, No. 141146; Court of Appeals No. 296233.

PEOPLE v MARK ROWE, No. 141148; Court of Appeals No. 296234.

PEOPLE v FREDDIE HARRIS, No. 141156; Court of Appeals No. 289074.

PEOPLE v HEISE, No. 141157; Court of Appeals No. 290202.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v MCCORMICK, No. 141158; Court of Appeals No. 296866.

PEOPLE v VALENTINE, No. 141163; Court of Appeals No. 289853.

PEOPLE v SOULE, No. 141165; Court of Appeals No. 296673.

PEOPLE v CROSBY, No. 141167; Court of Appeals No. 288218.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v ADONIS FRYE, No. 141171; Court of Appeals No. 288444.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v BERNARDO, No. 141173; Court of Appeals No. 297017.

PEOPLE v THORNTON, No. 141194; Court of Appeals No. 296562.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v RINEHART, No. 141195; Court of Appeals No. 296945.

PEOPLE v DENNIS JACKSON, No. 141197; Court of Appeals No. 283092.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v SANDERS, Nos. 141198 and 141199; Court of Appeals Nos. 288099 and 288100.

MORAN v ROY, No. 141200; Court of Appeals No. 295746.

PEOPLE v ALEX ALEXANDER, No. 141201; Court of Appeals No. 297005.

PEOPLE v PIERRE JORDAN, No. 141202; Court of Appeals No. 290974.

PEOPLE v HUGHES, No. 141204; Court of Appeals No. 296667.

PEOPLE v SELLERS, No. 141205; Court of Appeals No. 290187.

PEOPLE v DARIUS DIXON, No. 141207; Court of Appeals No. 289019.

PEOPLE v POSTON, No. 141228; Court of Appeals No. 285472.

PEOPLE v KEVIN BRIGGS, No. 141235; Court of Appeals No. 297583.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v ABSOLEM THOMAS, No. 141246; Court of Appeals No. 296960.

KUCHARCZYK v DAIMLERCHRYSLER CORPORATION, No. 141252; Court of Appeals No. 295894.

FINLEY v SAM'S CLUB, No. 141261; Court of Appeals No. 289437.

WATERTOWN TOWNSHIP v NORDLUND, No. 141271; Court of Appeals No. 290117.

KOCENDA v CITY OF TROY, No. 141273; Court of Appeals No. 290346.

WILSON v RIEBSCHLEGER, No. 141275; Court of Appeals No. 289009.

PEOPLE v TIMOTHY BROWN, No. 141362; Court of Appeals No. 297479.

SHINN v SHINN, No. 141399; Court of Appeals No. 295483.

KING v OAKLAND COUNTY PROSECUTOR, No. 141405; Court of Appeals No. 298947.

PEOPLE v THADDEUS WILLIAMS, No. 141430; Court of Appeals No. 295546.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

MCCARTHY v SOSNICK, Nos. 141439 and 141340; Court of Appeals Nos. 293482 and 293483. The motion for sanctions is granted, based on the plaintiff's inflammatory and unsubstantiated accusations regarding the conduct of the defendants and the Court of Appeals. The plaintiff is ordered to pay this Court $250 within 28 days of the date of this order.

MCCARTHY v SOSNICK, Nos. 141442 and 141443; Court of Appeals Nos. 294383 and 294385. The motion for sanctions is granted, based on the plaintiff's inflammatory and unsubstantiated accusations regarding the conduct of the defendants and the Court of Appeals. The plaintiff is ordered to pay this Court $250 within 28 days of the date of this order.

RHEAUME v STATE FARM AUTOMOBILE INSURANCE COMPANY, No. 141511; Court of Appeals No. 298524.

ACEY v CONSUMERS ENERGY COMPANY, No. 141512; Court of Appeals No. 298525.

Application for Leave to Appeal Dismissed September 9, 2010:

PEOPLE v TREVINO, No. 141519; Court of Appeals No. 298040. Because the application seeks to appeal a ruling made in connection with this case, which has since been dismissed, it is dismissed.

Leave to Appeal Before Decision by the Court of Appeals Denied September 9, 2010:

PEOPLE v CUNNINGHAM, No. 141345; Court of Appeals No. 298517.

Superintending Control Denied September 9, 2010:

SCHMIDT v ATTORNEY GRIEVANCE COMMISSION, No. 141046.

Reconsideration Denied September 9, 2010:

PEOPLE v MCBURNEY, No. 139941; Court of Appeals No.285485. Leave to appeal denied at 486 Mich 996.

PEOPLE v JONATHON HUDSON, No. 140054; Court of Appeals No. 292918. Leave to appeal denied at 486 Mich 927.

PEOPLE v HARRINGTON, No. 140156; Court of Appeals No. 292664. Leave to appeal denied at 486 Mich 928.

PEOPLE v WARE, No. 140168; Court of Appeals No. 292380. Leave to appeal denied at 486 Mich 1042.

PEOPLE v HERNANDEZ, No. 140222; Court of Appeals No. 293425. Leave to appeal denied at 486 Mich 1042.

PEOPLE v RONNELL JOHNSON, No. 140362; Court of Appeals No. 286096. Leave to appeal denied at 486 Mich 902.

PEOPLE v STEPHENS, No. 140413; Court of Appeals No. 294749. Leave to appeal denied at 486 Mich 961.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v MONK, No. 140426; Court of Appeals No. 293656. Leave to appeal denied at 486 Mich 1043.

PEOPLE v CHRISTIAN PHILLIPS, No. 140473; Court of Appeals No. 293442. Leave to appeal denied at 486 Mich 1043.

PEOPLE v DUNLAP, No. 140501; Court of Appeals No. 294407. Leave to appeal denied at 486 Mich 1044.

PEOPLE v BUCKNER, No. 140530; Court of Appeals No. 281384. Summary disposition at 486 Mich 906.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v POOLE, No. 140589; Court of Appeals No. 284245. Leave to appeal denied at 486 Mich 1045.

PEOPLE v PERREAULT, No. 140630; Court of Appeals No. 288540. Summary disposition at 486 Mich 914.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v MAURICE JACKSON, No. 140706; Court of Appeals No. 286964. Leave to appeal denied at 486 Mich 930.

PEOPLE v SOUSA, No. 140791; Court of Appeals No. 295257. Leave to appeal denied at 486 Mich 1058.

PEOPLE v BARRY ADAMS, No. 140825; Court of Appeals No. 282638. Leave to appeal denied at 486 Mich 1047.

Leave to Appeal Denied September 10, 2010:

In re KENNEDY, No. 141488; Court of Appeals No. 295411.

In re FRY, No. 141595; Court of Appeals No. 295682.

Superintending Control Denied September 10, 2010:

DUNCHOCK v ATTORNEY DISCIPLINE BOARD, No. 141635.

Rehearing Denied September 14, 2010:

SMITH v ANONYMOUS JOINT ENTERPRISE, Nos. 138456 and 138457. Reported at 487 Mich 102. In this case motions for rehearing are considered and they are denied, there being no majority in favor of granting rehearing or other relief. KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., would deny rehearing. CORRIGAN, YOUNG, and MARKMAN, JJ., would grant rehearing.

CORRIGAN, J. (*dissenting*). I would grant defendants' motions for rehearing, and on rehearing, I would vacate this Court's July 30, 2010, decision and affirm the Court of Appeals for the reasons set forth in my partial dissent in *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 131 (2010).

YOUNG and MARKMAN, JJ., joined the statement of CORRIGAN, J.

DAVIS, J., not participating. I recuse myself and am not participating because I had prior personal knowledge of the facts in this case. See MCR 2.003(B).

KYSER v KASSON TOWNSHIP, No. 136680. Reported at 486 Mich 514.

KELLY, C.J., and CAVANAGH, J., would grant rehearing.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v DUPREE, No. 139396. Reported at: 486 Mich 693.

Summary Disposition September 15, 2010:

PEOPLE v MICHAEL JOHNSON, No. 140255; Court of Appeals No. 294396. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether the sentencing guidelines apply to conditions imposed by a court under MCL 762.13 of the Holmes Youthful Trainee Act.

LOAR v DEPARTMENT OF HUMAN SERVICES, No. 140810; Court of Appeals No. 294087. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for an explanation of the reasons for the denial of the plaintiffs' complaint for mandamus. We do not retain jurisdiction.

PEOPLE v CRAIG, No. 141033; Court of Appeals No. 296159. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for amendment of the judgment of sentence to reflect a single conviction under MCL 750.338b for gross indecency between male and female as a sexually delinquent person as defined by MCL 750.10a, with a single sentence of 13 to 40 years, pursuant to the plea and sentence agreement. MCL 750.10a is a definitional statute, and does not carry the possibility of a separate conviction or sentence independent of other charges in the criminal code. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

Leave to Appeal Granted September 15, 2010:

EVANS v GROSSE POINTE PUBLIC SCHOOL SYSTEM, No. 140670; Court of Appeals No. 288546.

DUFFY v DEPARTMENT OF NATURAL RESOURCES, No. 140937; Court of Appeals No. 289644. The parties shall include among the issues to be briefed whether the Little Manistee Trail is a "highway" within the meaning of MCL 691.1401(e) and, if it is, whether MCL 691.1402(1) exempts the state and the Department of Natural Resources from liability for maintaining a trailway that is not adjacent to any vehicular highway.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered September 15, 2010:

DRAKE v CITY OF BENTON HARBOR, No. 140685; Court of Appeals No. 287502. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall address whether the city of Benton Harbor may lease a portion of Jean Klock Park to Harbor Shores Community Redevelopment Corporation to develop 3 holes of a proposed 18-hole championship Jack Nicklaus golf course, without violating (1) the restriction set forth in the 1917 deed or (2) the January 27, 2004, consent judgment in an earlier lawsuit between the plaintiffs and the city relating to the city's sale of a portion of Jean Klock Park to Grand Boulevard Renaissance, LLC, for the construction of a residential development. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The Michigan Municipal League and the Michigan Recreation and Park Association are invited to file briefs amicus curiae. Other persons or

groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v NAYKIMA HILL, No. 141122; Court of Appeals No. 290031. We direct the clerk to schedule oral argument on whether to grant the applications or take other peremptory action. MCR 7.302(H)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing (1) whether the dog tracking testimony was admitted in error and (2) whether, in light of the resolution of that issue, the admission of Jacqueline Sistrunk's out-of-court statement was harmless beyond a reasonable doubt. They should not submit mere restatements of their application papers.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

Leave to Appeal Denied September 15, 2010:

PITTMAN v BOARD OF EDUCATION, WYOMING PUBLIC SCHOOLS, No. 140068; Court of Appeals No. 292475. The application for leave to appeal the October 16, 2009, order of the Court of Appeals is considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., would remand this case to the Court of Appeals for consideration as on leave granted.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

In re KADZBAN, No. 140099; Court of Appeals No. 292516.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

MAY v TITAN INSURANCE COMPANY, Nos. 140736 and 140737; Court of Appeals Nos. 287250 and 287252.

HATHAWAY, J., would grant leave to appeal.

ALLEN v CITY OF LAINGSBURG, No. 140846; Court of Appeals No. 286031.

WARNER v CENTER FOR FORENSIC PSYCHIATRY, No. 140861; Court of Appeals No. 288979.

HATHAWAY, J., would grant leave to appeal.

In re UPJOHN ESTATE, No. 140879; Court of Appeals No. 278668.

PEOPLE v HURN, No. 140947; Court of Appeals No. 295974.

DOBROWSKI v JAY DEE CONTRACTORS, INCORPORATED, No. 140969; Court of Appeals No. 288206.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

GAITAN v LAKESHORE HABITAT FOR HUMANITY, INCORPORATED, Nos. 141047 and 141048; Court of Appeals Nos. 287116 and 288092.

PEOPLE v BRUCE PARKER, No. 141096; Court of Appeals No. 288988.

PEOPLE v KURTZ, No. 141138; Court of Appeals No. 296653.

Superintending Control Denied September 15, 2010:

BARKOVIC v ATTORNEY DISCIPLINE BOARD, No. 141472.

KELLY, C.J., and HATHAWAY and DAVIS, JJ., would grant the requested relief.

Leave to Appeal Before Decision by the Court of Appeals Denied September 15, 2010:

ZUNICH v MIDMICHIGAN MEDICAL CENTER, Nos. 141053 and 141054; Court of Appeals Nos. 297456 and 297457.

Summary Disposition on Reconsideration September 17, 2010:

PEOPLE v SIRDAREAN ADAMS, No. 140384; Court of Appeals No. 287034. The motion for reconsideration of this Court's June 25, 2010 order is considered, and it is granted. We vacate our order dated June 25, 2010. 486 Mich 1040. On reconsideration, the application for leave to appeal the November 19, 2009, judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to the Court of Appeals for a new appeal. The defendant requested the appointment of appellate counsel in the district court while the prosecution's interlocutory appeal was pending in the Court of Appeals, but counsel was not appointed until after the Court of Appeals issued its judgment on November 19, 2009. Consequently, the defendant was not represented by counsel during the prosecution's interlocutory appeal. On remand, the defendant is entitled to appointed appellate counsel.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered September 17, 2010:

AMERISURE MUTUAL INSURANCE COMPANY v HALL STEEL COMPANY, No. 140784; Court of Appeals No. 286677. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether Hall Steel's act of supplying a nonconforming grade of steel constitutes an "occurrence" under the terms of Amerisure's insurance policy. The parties should not submit mere restatements of their application papers.

Summary Disposition September 22, 2010:

MICHIGAN AFSCME COUNCIL 25 v WAYNE COUNTY, No. 141738; Court of Appeals No. 298832. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration or clarification in light of the Wayne Circuit Court's September 9, 2010, order. The panel should also consider whether relief at this point is moot in view of the fact that the layoff periods have passed. The motion for stay is denied as moot. We do not retain jurisdiction.

Leave to Appeal Denied September 22, 2010:

In re NORDBERG, No. 141585; Court of Appeals No. 295233.

Leave to Appeal Denied September 24, 2010:

DANIELS v PETROSKY-CLARK, No. 140468; Court of Appeals No. 288403. The application for leave to appeal the December 15, 2009, judgment of the Court of Appeals is considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action. The motion for stay is denied as moot.

YOUNG, J., would reverse the judgment of the Court of Appeals.

MARKMAN, J. (*dissenting*). I dissent from this Court's denial of leave to appeal because plaintiff, in my judgment, has not set forth sufficient evidence to sustain her respondeat superior claim in this automobile negligence action. Accordingly, I would reverse the judgment of the Court of Appeals and reinstate the decision of the trial court.

The trial court found, and the evidence establishes, that defendant Petrosky-Clark, an employee of defendant Haas Publishing, was driving to work on the morning of the accident to attend a weekly sales meeting. "[A] master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment." *Murphy v Kuhartz*, 244 Mich 54, 56 (1928). Generally, an employee is not acting within the scope of his or her employment when traveling to and from work. *Thomas v Certified Refrigeration, Inc*, 392 Mich 623, 631 n 3 (1974). Exceptions to this general rule exist where the employee is engaged in a "special mission in the interest of and at the direction of his employer," *LeVasseur v Allen Electric Co*, 338 Mich 121, 123 (1953), or where the employer derives a special benefit from the employee's trip, *Kester v Mattis, Inc*, 44 Mich App 22, 24 (1972). Here, Petrosky-Clark's attendance at a weekly sales meeting, while certainly of benefit to her employer, as would be everything else that she does during the workday, is not the type of "special" benefit contemplated by this exception. As explained in *Stark v L E Myers Co*, 58 Mich App 439, 444 (1975), "[i]f any benefits were so derived, it was not a special benefit to the employer but a benefit common to all employers." That is, Petrosky-Clark went to work as she was required to do, a situation that falls squarely within the general rule that an employee is not acting within the scope of his or her

employment when traveling to and from work. Because there was no genuine issue of material fact on this issue, Haas, in my judgment, was entitled to summary disposition, as the trial court so held.

CORRIGAN, J., joined the statement of MARKMAN, J.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

ANDERSON v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 140120; Court of Appeals No. 277096. The application for leave to appeal the August 25, 2009, judgment of the Court of Appeals is considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the Court's decision to deny defendant State Farm's application for leave to appeal. Defendant automobile no-fault insurer argues that plaintiff insured will receive an unjustified $3.2 million because the jury verdict will require two insurance companies to pay for duplicate benefits. The trial court precluded the jury from hearing proof that plaintiff stood to recover nearly $675,000 per year by receiving 22 facial injections twice a week. The trial court's decision to exclude evidence of collateral source benefits seems outside the range of principled outcomes. It deprived the jury of facts highly relevant to its determination whether the facial injections were reasonable and necessary, thus impeding the jury's search for truth. Therefore, I would grant leave to appeal to consider the showing required under *Nasser v Auto Club Ins Ass'n*, 435 Mich 33 (1990), to admit evidence of collateral source benefits in order to show malingering or motivation of financial gain, and to determine whether the trial court abused its discretion when it excluded such evidence in this case.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

Plaintiff's face and head were injured when she was involved in an accident in December 1999 while riding in a vehicle insured under an uncoordinated no-fault policy issued by defendant State Farm, which became liable for personal protection insurance (PIP) benefits arising from the accident. As noted, plaintiff also had a health insurance policy with Blue Cross Blue Shield. Plaintiff's diagnosis of multiple sclerosis predated the accident. After the accident, she allegedly experienced headaches and pain in her face, head, neck and shoulders. Dr. Maurice Converse, an anesthesiologist, began injecting plaintiff with steroids, an anesthetic, and a compound called Sarapin at the MedBack Clinic in Ohio. Plaintiff's medical records show, and Dr. Converse acknowledged, that his injections of plaintiff were initially based on treating symptoms associated with plaintiff's multiple sclerosis (hence not accident related).

The trial court precluded the jury from hearing that the MedBack Clinic was closed after an FBI investigation and raid involving the MedBack Clinic's healthcare fraud. After the MedBack Clinic closed, Dr. Converse rented space at another clinic in Ohio so he could continue injecting plaintiff. Remarkably, plaintiff was his only patient.

State Farm initially paid for the injections. State Farm paid plaintiff nearly $300,000 for those treatments. Plaintiff eventually began receiving 44 injections per week. In August 2001, State Farm initiated a fraud investigation of plaintiff's claims, which included a review of plaintiff's medical files and an independent medical examination. Dr. Eugene Mitchell conducted the independent medical examination and concluded that the injection treatments should be stopped. As a result, State Farm ceased paying plaintiff for the injections.

Plaintiff thereafter filed this no-fault action, and the case proceeded to a jury trial. State Farm's liability for plaintiff's injections depended on the jury's determination whether plaintiff's injuries for which she received the injections arose out of the automobile accident or her multiple sclerosis and whether the injections that Dr. Converse administered were reasonable and necessary. The jury returned a verdict for plaintiff, awarding her nearly $2.5 million in medical expenses and interest on the unpaid benefits. The trial court entered a judgment that also included costs and attorney fees, resulting in a total judgment of more than $3.2 million. The trial court denied State Farm's motion for judgment notwithstanding the verdict. The Court of Appeals affirmed.

In its application for leave to appeal to this Court, State Farm argues that the trial court erred in granting plaintiff's motion in limine to exclude evidence that plaintiff's medical benefits were uncoordinated and that Blue Cross was paying plaintiff's medical expenses.

II. ANALYSIS

Under MCL 500.3107(1)(a), a no-fault insurer is liable for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation." Plaintiff's motion to exclude evidence of the uncoordinated benefits was based on this Court's decision in *Nasser*. Like this case, *Nasser* was a no-fault action in which the trial court granted the plaintiff's motion to exclude all evidence of other insurance coverage. The trial court ruled, and the Court of Appeals agreed, that evidence of other insurance coverage was barred by the collateral source rule and MRE 403.

In *Nasser*, we held that evidence of other insurance coverage is inadmissible for the purpose of mitigating damages under the collateral source rule, but recognized an "exception to the general rule of exclusion," where evidence of collateral source benefits would establish malingering. *Nasser*, 435 Mich at 58-59. We noted that evidence of collateral source benefits should be admitted " 'only if it appears to the trial judge from other evidence that there is a real possibility that plaintiff was motivated by the receipt of collateral source benefits to remain inactive as long as he did.' " *Id*. at 59, quoting 22 Am Jur 2d Damages, § 967, p 1004. Having reversed the decision of the trial court on other grounds and remanded for further proceedings, we declined to decide whether the "exception" to the collateral source rule applied. *Nasser*, 435 Mich at 62. We directed the trial court, however, to consider

on remand whether the evidence was "offered to prove malingering or exaggeration of injuries by plaintiff, rather than in mitigation of damages." *Id*. at 63.

In this case, the trial court precluded the jury from hearing that plaintiff was making nearly $675,000 per year by receiving 22 injections twice a week. At the hearing on plaintiff's motion in limine to exclude evidence of collateral source benefits, defense counsel argued that "the possibility of putting in your pocket the same amount of money that the doctor would put in his pocket if he were being paid by Blue Cross is a motive to undergo these treatments . . . ." Transcript of April 7, 2005, motion hearing, p 30. Defense counsel also argued:

> All I have to do in any case is to be able to show that this person's activities may or may not be motivated by what you would think a person normally goes to a doctor for in this case. . . . She goes for almost three years now and undergoes these treatments, and she's going to make $ 2 million off of this treatment. [*Id*.]

The trial court granted plaintiff's motion to exclude the evidence, ruling that "the fact that certain doctors may not be able to understand . . . plaintiff's response or lack of response to certain injections" would not lead it to determine that, under *Nasser*, plaintiff was malingering. *Id*. at 47-48.

The Court of Appeals held that the trial court did not abuse its discretion in excluding evidence of plaintiff's receipt of collateral source benefits because defense counsel failed to present independent evidence of malingering and therefore failed to "meet its foundational burden under *Nasser*." *Anderson v State Farm Mut Auto Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued August 25, 2009 (Docket No. 277096), pp 3-4. I believe that the circumstances on this record reflect an adequate foundation to show that plaintiff was engaged in malingering.

Defendant clearly sought to admit the evidence of collateral source benefits to show that plaintiff was motivated by financial gain, rather than by a need for medical treatment. Plaintiff's receipt of nearly $675,000 a year for facial injections was surely a sufficient foundation to admit proof of the collateral source benefits. The erroneous exclusion of this evidence appears inconsistent with substantial justice and affects a substantial right of State Farm[1] because the evidence was critical to the jury's determination whether the injections administered by Dr. Converse were "reasonable and necessary" under MCL 500.3107(1)(a). The trial court's ruling precluded the jury from considering the plausible alternative explanation that plaintiff continued to receive 44 injections in her face per week not because they relieved

---

[1] A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion, but "any error in the admission or exclusion of evidence will not warrant appellate relief 'unless refusal to take this action appears . . . inconsistent with substantial justice,' or affects 'a substantial right of the [opposing] party.' " *Craig v Oakwood Hosp*, 471 Mich 67, 76 (2004) (citations omitted).

her pain, but because she stood to gain $295 per injection—or $12,980 per week—from continuing the treatment. I would grant State Farm's request that this Court review what occurred here and consider whether the lower courts' rulings were consistent with *Nasser*. In addition, I question why the verdict was not reduced under MCL 600.6303(1),[2] the collateral source rule.

YOUNG and MARKMAN, JJ., joined the statement of CORRIGAN, J.

KELLY, C.J., not participating. I am not participating because of a close familial relationship with one of the witnesses.

Summary Disposition September 27, 2010:

ALLEY v SECK, No. 137412; Court of Appeals No. 283634. By order of May 7, 2009, the application for leave to appeal the August 22, 2008, order of the Court of Appeals was held in abeyance pending the decision in *Holman v Rasak* (Docket No. 137993). On order of the Court, the case having been decided on July 13, 2010, 486 Mich 429 (2010), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted in light of *Holman*.

HATHAWAY, J., would grant leave to appeal.

EDW C LEVY COMPANY v MARINE CITY BOARD OF ZONING APPEALS, No. 141143; Court of Appeals No. 296023. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v CARREKER, No. 141284; Court of Appeals No. 290501. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court. On remand, in addition to complying with the Court of Appeals' judgment, the circuit court shall correct the erroneous statement in the defendant's sentencing information report that the defendant pleaded guilty to first-degree home

---

[2] MCL 600.6303(1) provides:

> In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the verdict. Subject to subsection (5), if the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection (2). This reduction shall not exceed the amount of the judgment for economic loss or that portion of the verdict which represents damages paid or payable by a collateral source.

invasion. The sentencing information report should instead state that the defendant was found guilty of first-degree home invasion after a bench trial. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Leave to Appeal Denied September 27, 2010:

PEOPLE v REISS, No. 137321; Court of Appeals No. 269630.

FANNING v WILLIAM BEAUMONT HOSPITAL, No. 139502; Court of Appeals No. 290721.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v MEADE, No. 140198; Court of Appeals No. 293722.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v KENNEDY, No. 140288; Court of Appeals No. 293347.

PEOPLE v TIMOTHY BARNES, No. 140367; Court of Appeals No. 293382.

PEOPLE v TERENCE JOHNSON, No. 140374; Court of Appeals No. 294492.

PEOPLE v MIDDLEBROOK, No. 140391; Court of Appeals No. 293662.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

FRUITMAN v RUBINSTEIN, No. 140475; Court of Appeals No. 286916.

KELLY, C.J., not participating. I recuse myself and am not participating because I have a social acquaintance with some of the parties.

STOUT TOOL CORPORATION v KANE, No. 140492; Court of Appeals No. 291996.

FIA CARD SERVICES, N A v SELIM, No. 140520; Court of Appeals No. 286522.

PEOPLE v DELEON ALEXANDER, No. 140601; Court of Appeals No. 295124.

PEOPLE v GERALD CALKINS, No. 140607; Court of Appeals No. 294842.

PEOPLE v STEVEN THOMAS, No. 140609; Court of Appeals No. 294014.

ELLIOTT v THERRIEN, No. 140713; Court of Appeals No. 288235.

NIEWIANDOMSKI v SMITH, No. 140725; Court of Appeals No. 293954.

PEOPLE v WINFRED PHILLIPS, No. 140742; Court of Appeals No. 288414.

PEOPLE v ALEMAN, No. 140780; Court of Appeals No. 294351.

PEOPLE v DUANE JOHNSON, No. 140786; Court of Appeals No. 289338.

PEOPLE v GARY WILLIAMS, No. 140793; Court of Appeals No. 295050.

PEOPLE v NICHOLAS PHILLIPS, No. 140815; Court of Appeals No. 295595.

PEOPLE v MAYWEATHER, No. 140848; Court of Appeals No. 288415.

PEOPLE v LESTER BELL, No. 140884; Court of Appeals No. 294778.

PEOPLE v FLOWERS, No. 140951; Court of Appeals No. 286018.

PEOPLE v DONNIE BAKER, No. 140971; Court of Appeals No. 287849.

PEOPLE v AMADOR, No. 140975; Court of Appeals No. 296825.

PEOPLE v ROBERTO REED, No. 140998; Court of Appeals No. 296065.

PEOPLE v SLAUGHTER, No. 141004; Court of Appeals No. 296691.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v AMANDA BEAN, No. 141019; Court of Appeals No. 296369.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v TETREAU, No. 141028; Court of Appeals No. 295540.

PEOPLE v STEWART, No. 141076; Court of Appeals No. 296404.

PEOPLE v CHU, No. 141091; Court of Appeals No. 295352.

PEOPLE v SPACHER, No. 141102; Court of Appeals No. 296184.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v CALVIN PARKER, No. 141103; Court of Appeals No. 295473.

PEOPLE v ERNEST HALL, No. 141104; Court of Appeals No. 295032.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

TRUPIANO v TRUPIANO, No. 141137; Court of Appeals No. 294439.

PEOPLE v JENNINGS, No. 141139; Court of Appeals No. 296289.

PEOPLE v PENNA, No. 141155; Court of Appeals No. 297144.

SAVAS v YAKER, No. 141159; Court of Appeals No. 288991.

PEOPLE v STAMPER, No. 141175; Court of Appeals No. 297137.

PEOPLE v COLWELL, No. 141185; Court of Appeals No. 296930.

PEOPLE v CADARETTE, No. 141203; Court of Appeals No. 289088.

CUMULUS BROADCASTING, LLC v KEADY, No. 141209; Court of Appeals No. 290112.

PEOPLE v ZAKER, No. 141217; Court of Appeals No. 292898.

PEOPLE v REAM, No. 141220; Court of Appeals No. 288256.

PEOPLE v NEKI ANDERSON, No. 141221; Court of Appeals No. 289854.

PEOPLE v RUSSELL, No. 141222; Court of Appeals No. 296573.

PEOPLE v MARK HARTMAN, No. 141225; Court of Appeals No. 296703.

BROOKLYN PLUMBING HEATING & AIR CONDITIONING v AIELLO, No. 141226; Court of Appeals No. 283894.

PEOPLE v MARK HARTMAN, No. 141227; Court of Appeals No. 296704.

PEOPLE v SCOTT JONES, No. 141229; Court of Appeals No. 288671.

SCHELLENBERG v BINGHAM TOWNSHIP, No. 141233; Court of Appeals No. 289801.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v MAXEY, No. 141234; Court of Appeals No. 289023.

PEOPLE v FREEMON, No. 141236; Court of Appeals No. 296884.

PEOPLE v BELCHER, No. 141238; Court of Appeals No. 298855.

PEOPLE v JEWELL, No. 141240; Court of Appeals No. 288442.

PEOPLE v MARCUS HILL, No. 141247; Court of Appeals No. 289645.

PEOPLE v BURDICK, No. 141248; Court of Appeals No. 296988.

PEOPLE v STEPHENSON, No. 141256; Court of Appeals No. 288867.

PEOPLE v TODD DAVIS, No. 141258; Court of Appeals No. 290970.

PEOPLE v DAVID HUDSON, Nos. 141262 and 141263; Court of Appeals Nos. 290148 and 290215.

PEOPLE v SMALLWOOD, No. 141266; Court of Appeals No. 289081.

CONTRACT SUPPLY COMPANY, INCORPORATED v ADCO STRATFORD VILLAGE NORTH, No. 141272; Court of Appeals No. 289172.

LENNEN v LENNEN, No. 141282; Court of Appeals No. 295559.

PEOPLE v ZIMMERMAN, No. 141286; Court of Appeals No. 287895.

PEOPLE v WARNOCK, No. 141293; Court of Appeals No. 297233.

PEOPLE v WILLIAM REID, No. 141297; Court of Appeals No. 296380.

PEOPLE v JEFFREY MILLER, No. 141299; Court of Appeals No. 287851.

PEOPLE v ANTHONY BELL, No. 141304; Court of Appeals No. 290424.

PEOPLE v PINNACE, No. 141305; Court of Appeals No. 297301.

PEOPLE v DREMARIS JACKSON, No. 141306; Court of Appeals No. 289875.

PEOPLE v MCCONEGHY, No. 141307; Court of Appeals No. 296174.

PEOPLE v BASS, No. 141308; Court of Appeals No. 289299.

PAIGE v CITY OF STERLING HEIGHTS, No. 141311; Court of Appeals No. 290377.

PEOPLE v NOBLE, No. 141322; Court of Appeals No. 290462.

PEOPLE v DOUGHRITY, No. 141323; Court of Appeals No. 295807.

PEOPLE v MCDOWELL, No. 141324; Court of Appeals No. 297518.

PEOPLE v BALL, No. 141325; Court of Appeals No. 291433.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v DILLARD, No. 141328; Court of Appeals No. 297129.

COHEN v NERENBERG, No. 141329; Court of Appeals No. 290569.

PEOPLE v PETTIFORD, No. 141330; Court of Appeals No. 288551.

ROSENBAUM v NERENBERG, No. 141331; Court of Appeals No. 290570.

PEOPLE v DAMIEN JOHNSON, No. 141334; Court of Appeals No. 290461.

PEOPLE v DONALD TOLBERT, No. 141337; Court of Appeals No. 293142.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v ROSALIND BROWN, No. 141338; Court of Appeals No. 288552.

PEOPLE v SEEGARS, No. 141343; Court of Appeals No. 290899.

MORRIS v MICHIGAN INSURANCE COMPANY, No. 141346; Court of Appeals No. 290465.

PEOPLE v ARMEL ADAMS, No. 141351; Court of Appeals No. 297385.

PEOPLE v IMELMANN, No. 141360; Court of Appeals No. 297370.

PEOPLE v MAURICE MOORE, No. 141365; Court of Appeals No. 297741.

PEOPLE v DOLLY-MCGLOTHLIN, No. 141368; Court of Appeals No. 297324.

PEOPLE v CARRODINE, No. 141369; Court of Appeals No. 289802.

PEOPLE v RONALD WHEELER, No. 141372; Court of Appeals No. 289162.

DELAY v BURNS INTERNATIONAL SECURITY SERVICES CORPORATION, No. 141382; Court of Appeals No. 296781.

PEOPLE v RICHARDS, No. 141392; Court of Appeals No. 290514.

PEOPLE v COLE, No. 141400; Court of Appeals No. 288790.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v LESLIE MAYES, No. 141403; Court of Appeals No. 291264.

PEOPLE v SOURS, No. 141408; Court of Appeals No. 298171.

PEOPLE v BUSCH, No. 141415; Court of Appeals No. 297847.

SWANSON v WESTGATE LIVING CENTRE, No. 141417; Court of Appeals No. 297213.

TABBERT v BARKWAY, No. 141420; Court of Appeals No. 296195.

ASAMA COLDWATER MANUFACTURING, INCORPORATED v DEPARTMENT OF TREASURY, No. 141424; Court of Appeals No. 290584.

PEOPLE v SANDOVAL, No. 141426; Court of Appeals No. 291626.

PEOPLE v KOLBUCAJ, No. 141428; Court of Appeals No. 297606.

RIGGS v ANDERSON, Nos. 141453, 141454, and 141455; Court of Appeals Nos. 290771, 293218, and 293831.

BRUNS v KENT CIRCUIT JUDGE, No. 141554; Court of Appeals No. 296817.

PEOPLE v VARTANIAN, No. 141623; Court of Appeals No. 291112.

Superintending Control Denied September 27, 2010:

MCCREARY v ATTORNEY GRIEVANCE COMMISSION, No. 141007.

Reconsideration Denied September 27, 2010:

ALDERMAN v J C DEVELOPMENT COMMUNITIES, LLC, No. 140051; Court of Appeals No. 285744. Summary disposition at 486 Mich 906.

ERBER v DEPARTMENT OF COMMUNITY HEALTH, No. 140177; Court of Appeals No. 285470. Leave to appeal denied at 486 Mich 936.

PEOPLE v TORANTIE HANKINS, No. 140310; Court of Appeals No. 291461. Leave to appeal denied at 487 Mich 851.

VEMULAPALLI v CITY OF FLINT, No. 140494; Court of Appeals No. 287566. Leave to appeal denied at 486 Mich 940.

PEOPLE v PIERCE, No. 140671; Court of Appeals No. 293993. Leave to appeal denied at 486 Mich 1046.

PEOPLE v NOBLES, No. 140672; Court of Appeals No. 293121. Leave to appeal denied at 486 Mich 1046.

PEOPLE v DANIELS, No. 140740; Court of Appeals No. 295844. Leave to appeal denied at 486 Mich 854.

WORLD SAVINGS BANK v NASSAR, No. 140794; Court of Appeals No. 288904. Leave to appeal denied at 486 Mich 996.

Statement Regarding Decision on Motion for Disqualification Entered September 28, 2010:

BEZEAU v PALACE SPORTS & ENTERTAINMENT, INC, No. 137500. Reported at 487 Mich 455.

DAVIS, J. Defendant has brought this motion seeking my recusal on its motion for rehearing of this Court's July 31, 2010, opinion in this case. Because I do not believe that grounds supporting recusal exist, I deny defendant's motion.

Defendant asks that I recuse myself from participation in the motion for rehearing because I "did not consider the application for leave to appeal that was decided by *Bezeau v Palace Sports & Entertainment, Inc*.[1] The term rehearing itself supposes that a jurist had heard a case once before."

As was noted in my nonparticipation statement in *People v Jackson*, 487 Mich 783, 808 (2010), a justice in transition's nonparticipation in a case that was heard before the Justice took office does not affect the ability of that justice to participate in subsequent motions for rehearing.

Summary Disposition September 29, 2010:

MAHER v MAHER, No. 141149; Court of Appeals No. 287309. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals holding that the appreciation realized from the Smith Barney investment account during the marriage was the defendant's separate property. The appreciation of an actively managed account during the parties' marriage is marital property. *Dart v Dart*, 460 Mich 573, 585 n 6 (1999), citing *Hanaway v Hanaway*, 208 Mich App 278 (1995), and *Reeves v Reeves*, 226 Mich App 490 (1997). The Court of Appeals held that neither plaintiff nor defendant actively handled or managed the account. However, because the trial court did not make a finding of fact as to whether the account was actively managed by either party, we remand this case to the Saginaw Circuit Court for full consideration of the issue, and for any further proceedings not inconsistent with this order. In all other respects, leave

---

[1] *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455 (2010).

to appeal is denied because we are not persuaded that the remaining question should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v JOHANSON, No. 141178; Court of Appeals No. 297169. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Livingston Circuit Court for correction of the judgment of sentence, which places the defendant in the custody of the Department of Corrections for the misdemeanor offenses of possessing marijuana and obscene conduct. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

WHITE v VICTOR AUTOMOTIVE PRODUCTS, INCORPORATED, Nos. 141310 and 141319; Court of Appeals No. 286181. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion, and we reinstate the summary disposition order of the Livingston Circuit Court.

HATHAWAY, J., would deny leave to appeal.

PEOPLE v DENNIS CLARK, No. 141449; Court of Appeals No. 285438. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we reinstate the judgment of the Kent Circuit Court.

Leave to Appeal Granted September 29, 2010:

MILLER-DAVIS COMPANY v AHRENS CONSTRUCTION, INCORPORATED, No. 139666; reported below: 285 Mich App 289.

WOLF v CITY OF DETROIT, No. 140679; reported below: 287 Mich App 184. The parties shall include among the issues to be briefed whether the Court of Appeals erred when it held that the challenged solid waste inspection fee is a valid user fee, rather than a tax that violates the Headlee Amendment, Const 1963, art 9, § 31. Specifically, the parties shall address (1) whether the challenged solid waste inspection fee serves a regulatory, rather than a revenue-raising, purpose (2) whether the fee is proportionate to the necessary costs of the inspection service, and (3) whether the fee is voluntary. See *Bolt v City of Lansing*, 459 Mich 152 (1998). The parties shall also address whether the Court of Appeals erred in its assessment of the significance of the defendant's replacement of a tax with the solid waste inspection fee, the defendant's inclusion of the fee on property tax bills, and the defendant's authorization of the placement of a lien on an owner's property for nonpayment of the fee, see *id*. at 168-169, and whether the Court of Appeals abused its discretion when it denied the plaintiff's motion for sanctions.

The Michigan Municipal League is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

KROHN v HOME-OWNERS INSURANCE COMPANY, No. 140945; Court of Appeals No. 283862. The parties shall include among the issues to be briefed (1) whether the experimental surgical procedure that the plaintiff underwent in Portugal was a "reasonably necessary" allowable expense under the no-fault act, MCL 500.3107(1)(a), (2) whether the procedure was "lawfully rendered" under MCL 500.3157, given that it is not approved to be performed in this country by the United States Food and Drug Administration (FDA), (3) whether the Court of Appeals erred by sua sponte raising the issue whether the trial court failed to perform its gatekeeper function under MRE 702 and *People v Davis*, 343 Mich 348 (1955); *Frye v United States*, 54 US App DC 46 (1923), to exclude testimony from the plaintiff's medical witness regarding the experimental surgical procedure, see *Craig v Oakwood Hosp*, 471 Mich 67, 82 (2004), (4) whether the Court of Appeals properly relied on *SPECT Imaging, Inc v Allstate Ins Co*, 246 Mich App 568, 578-579 (2001), for the proposition that a no-fault insurer is only liable for scientifically proven medical tests or procedures, and (5) whether the issue of reasonable necessity under MCL 500.3107(1)(a) may include consideration by the trier of fact of the success of the experimental procedure or of any degree of improvement in the plaintiff's condition.

The Michigan Association for Justice and the Michigan Defense Trial Counsel, Inc. are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

LOWEKE v ANN ARBOR CEILING & PARTITION COMPANY, INCORPORATED, No. 141168; Court of Appeals No. 289451.

PEOPLE v HUSTON, No. 141312; reported below: 288 Mich App 387.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered September 29, 2010:

PEOPLE v PELTOLA, No. 140524; Court of Appeals No. 288578. The defendant's application *in propria persona* for leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by the Court. With respect to the application filed by the State Appellate Defender Office, we direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall address the argument that the scoring of prior record variables is improper when the defendant's minimum and maximum sentences are doubled pursuant to MCL 333.7413(2). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

GREEN v PIERSON, No. 140808; Court of Appeals No. 289588. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether MCL 600.2301 applies to cases initiated before the

amendment of MCL 600.5856 in 2004 and whether the plaintiff in this case should have been allowed to amend his notice of intent. The parties should not submit mere restatements of their application papers.

The Michigan Association for Justice and the Michigan Defense Trial Counsel, Inc. are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied September 29, 2010:

COUNTY ROAD ASSOCIATION OF MICHIGAN v GOVERNOR, Nos. 140627 and 140628; Court of Appeals Nos. 288653 and 288691. The application for leave to appeal the January 12, 2010 judgment of the Court of Appeals is considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., would vacate the judgment of the Court of Appeals and remand this case to the Court of Appeals for reconsideration in light of *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010).

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

WIRTH v AMSTED INDUSTRIES, INCORPORATED, No. 141177; Court of Appeals No. 296188.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v MICHAEL GEORGE, No. 141254; Court of Appeals No. 288032.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the Court's decision to deny the prosecution's application for leave to appeal. I would grant leave to appeal.

In 2008, defendant Michael George was convicted of several charges involving the 1990 murder of his wife, Barbara George, at the Comics Book World retail store, which the couple owned together. Indeed, a jury convicted defendant of first-degree premeditated murder,[1] insurance fraud,[2] obtaining property by false pretenses,[3] and possession of a firearm during the commission of a felony.[4] The trial court thereafter granted defendant's motion for a new trial because three police tip sheets were discovered by the police after sentencing. On remand from this Court, the Court of Appeals affirmed the trial court's decision. It held that the trial court did not abuse its discretion in determining that

---

[1] MCL 750.316(1)(a).

[2] MCL 500.4511(1).

[3] MCL 750.218.

[4] MCL 750.227b.

defendant was entitled to a new trial on the basis of newly discovered evidence.[5] However, the Court of Appeals failed to fully grapple with the evidence proving defendant's guilt beyond a reasonable doubt as well as the critical fourth prong of *People v Cress*, 468 Mich 678 (2003). I would grant leave to appeal to consider whether defendant established that the three police tip sheets "make[] a different result probable on retrial"[6] and whether the trial court's decision to grant defendant a new trial based on newly discovered evidence fell outside the range of "reasonable and principled outcome[s]."[7]

I. EVIDENCE INTRODUCED AT TRIAL

The prosecution's theory was that defendant murdered Barbara because he was unhappy, was involved with another woman, and had financial incentives to kill his wife. The defense contended that an unknown assailant murdered Barbara during an armed robbery at Comics Book World and that defendant had been at his mother's house at the time of the murder. The prosecution introduced powerful circumstantial evidence that supported the jury verdict and discredited the defense theory of the case.

The prosecution established that defendant and Barbara had a troubled marriage but that Barbara did not believe in divorce. Although defendant told the police that his marriage was fine, several witnesses testified about the couple's marital discord. One witness recalled several different occasions where defendant would "storm[] out" of the couple's house and leave Barbara crying inside. Another witness who worked at a nail salon in the same plaza as Comics Book World observed "30, 35" arguments between defendant and Barbara during the "[l]ast couple months." This witness described the couple's arguments as "loud" and about "money or gambling." She specifically recalled that one "extremely loud argument" occurred about 2:30 p.m. on the day of Barbara's murder. The witness characterized the couple's final argument as "more violent" and stated that defendant "sounded much angrier than [during their] normal arguments." Just six days before the murder, defendant told store customer Theresa Danieluk that his wife was fat and unattractive. Defendant also stated that if he was not married to Barbara, he would take his children and move to Florida.

Defendant also denied being involved in any extramarital affairs to police investigators. Yet several witnesses testified about defendant's extramarital affairs and his flirtatious behavior toward other women. Defendant had an extramarital affair with store employee Renee Kotula. A customer recalled witnessing "a lot of flirting" between defendant and Kotula. Defendant's next-door neighbor observed defendant embracing

---

[5] *People v George*, unpublished opinion per curiam of the Court of Appeals, issued May 4, 2010 (Docket No. 288032).

[6] *Cress*, 468 Mich at 692.

[7] *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006).

and kissing Kotula a few weeks after the murder. About one month after Barbara's murder, Kotula moved in defendant's house and began living with defendant and his children. Defendant also had a six-month extramarital affair with Patrice Sartori while Barbara was pregnant with the couple's second child. Before Barbara's murder, defendant remarked to a male customer about Barbara wearing a demure nightgown "in a dissatisfying tone." Also, defendant acted "rather flirtatious" toward the store's female customers. Less than one month after his wife's death, defendant followed a female customer from Comics Book World and gave her a handwritten note that contained his phone number and stated "[y]ou look very, very, very pretty today. Thanks for coming in. Sincerely, Michael."

At the time of the murder, defendant, a former insurance salesman, was the beneficiary of two life insurance policies on Barbara totaling $130,000. By contrast, defendant only maintained one life insurance policy on himself in the amount of $30,000. He permitted a second policy on his life in the amount of $50,000 to lapse during the same period. Defendant also displayed his interest in receiving the life insurance proceeds from Barbara's death as soon as possible. While attending visitation hours at the funeral home for Barbara, one witness heard defendant ask his mother, "Mom, did you call the insurance company today?" Ultimately, defendant secured the life insurance proceeds less than three weeks after Barbara's death. Defendant also subsequently collected $12,604 in insurance proceeds for the alleged robbery of comic books that occurred at the store.

Additionally, many witnesses testified about defendant's peculiar statements and behavior during the period surrounding Barbara's murder. When defendant arrived at Comics Book World as the police were processing the crime scene, Detective Donald Steckman advised defendant that "there had been a problem in the store and his wife was in the hospital and that one of our detectives would be taking him to the hospital." Without Detective Steckman's having given defendant any information about where Barbara was found or about whether she suffered any head injuries, defendant volunteered to Detective Steckman that "something must have fallen on her head in the back room." Defendant made a similar statement without any prompting to Lieutenant Donald Brook while Lieutenant Brook drove defendant to the hospital. Barbara's youngest brother testified that when defendant arrived at the hospital, defendant's demeanor was "cold" and that defendant "didn't come up and hug anybody." Barbara's sister-in-law recalled that when someone notified the family that Barbara had died, defendant displayed his "relief, like almost a sigh." During visitation hours at the funeral home and at the funeral itself, several witnesses testified that defendant wore dark sunglasses and shed no tears. Defendant's friend also testified that when he suggested to defendant that their friends establish a reward for information concerning Barbara's murder, defendant told him that the police did not want anyone to offer a reward. That statement was false according to police witnesses who would have welcomed the establishment of a reward.

Other evidence discredited the defense theory that an unknown assailant murdered Barbara during an armed robbery. A prosecution expert testified that armed robberies of comic book stores are exceedingly rare. The display cases and the cash registers in the store had not been disturbed. One police officer found approximately $30 in the first cash register and $715 in the second cash register. The police also discovered more than $400 in Barbara's pocket and five pieces of jewelry, including a $2,500 ring, on her person. Although defendant initially told police that $2,000 was missing from the safe and that two boxes of expensive comic books that had been sitting on the safe disappeared, he later recanted his story about $2,000 being missing. The evidence technician who processed the crime scene testified that the safe "didn't have any prime [sic] marks on it or anything on it and it was unlocked but the door was closed." The back door to the store also did not have any pry marks. During the investigation to trace the stolen comic books listed by defendant, a customer told police that he previously purchased one of the comic books that defendant had listed as stolen. When the police informed defendant of the customer's statement, defendant recanted and asserted that the comic book in question was not one of the comic books that disappeared. This and other evidence buttressed the prosecution's theory that defendant filed a false insurance claim to recover insurance proceeds for the theft of two boxes of expensive comic books that never occurred. The prosecution also established that the defense's theory about an armed robbery differed from what defendant told investigators when the police contacted defendant after reopening their investigation in 2007. At that time, defendant disavowed his prior claims about an armed robbery and told the police that the killer murdered Barbara to exact revenge for defendant's gambling debts. Finally, the prosecution introduced testimony casting doubt on defendant's alibi. Defendant initially told police that he left Comics Book World at "approximately 4 o'clock" and that he arrived at his mother's house in Hazel Park "in the neighborhood of 5 p.m." where he remained until "approximately 7:30 p.m.." Yet Michael Renaud, a regular customer, testified that when he called Comics Book World between 5:15 p.m. and 5:45 p.m. on the day of the murder, defendant answered the phone and they spoke for "[l]ess than five minutes."

In sum, the prosecution introduced voluminous proofs against defendant. The Court of Appeals correctly observes that most of the evidence against defendant is circumstantial. It is undisputed, however, that "circumstantial evidence and reasonable inferences may be sufficient to prove the elements of a crime."[8] I would not discount the evidence presented by the prosecution merely because that evidence is circumstantial in nature.

II. THREE NEWLY DISCOVERED POLICE TIP SHEETS

The newly discovered evidence in this case consists of seven police tip sheets, which a police officer located after sentencing in a folder that had slipped between two other folders. The Court of Appeals concluded that

[8] *People v Tanner*, 469 Mich 437, 444 n 6 (2003).

three of the police tip sheets were significant enough to entitle defendant to a new trial. In *People v Cress*, this Court explained that in order to obtain a new trial on the basis of newly discovered evidence, the defendant must show that

> (1) "the evidence itself, not merely its materiality, was newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes a different result probable on retrial.[9]

The Court of Appeals failed to grapple adequately with the fourth prong of *Cress*. The three newly discovered police tip sheets do not make a different result probable on retrial. The Court of Appeals also erred insofar as it relied on the impeachment value of the three police tip sheets because "where the new[ly discovered] evidence is useful only to impeach a witness, it is deemed merely cumulative."[10]

The first police tip sheet describes a phone call that police received from an unidentified male informant one day after defendant's wife was murdered. The informant stated that he called the store at approximately 5:55 p.m., and the man who answered the phone said "HELLO." When the informant asked whether the store had a certain hockey card in stock, the man said "NO" and hung up the phone. The informant thought that this was a strange way for someone to answer the phone and respond to a customer's question. The Court of Appeals offers no explanation concerning why this first tip sheet assists the defense any more than it assists the prosecution. The tip sheet establishes that a man answered the phone at Comics Book World about the time of the murder. Defendant, a male coowner of the store, presumably would answer the ringing phone and respond to a customer's question. Assuming that the defense would have used the tip sheet to attack the sufficiency of the initial police investigation, the prosecution could have used the tip sheet to corroborate the testimony of Michael Renaud and to place defendant in the store immediately before the murder.[11] Consequently, the first tip sheet does not seem to make a different result more probable on retrial.

---

[9] *Cress*, 468 Mich at 692, quoting *People v Johnson*, 451 Mich 115, 118 n 6 (1996).

[10] *People v Barbara*, 400 Mich 352, 363 (1977); see also *People v Davis*, 199 Mich App 502, 516 (1993) ("Newly discovered evidence is not ground[s] for a new trial where it would merely be used for impeachment purposes.").

[11] Barbara George called Renee Balsick from the store at approximately 6:00 p.m. on the day of the murder. Balsick testified that between two and three minutes into their conversation, Barbara said that "she needed a second, she'd be right back, hold on" without any alarm in her voice, and Barbara put the phone down. Balsick testified that Barbara never

The second police tip sheet describes a phone call that police received 11 days after the murder from a woman who identified herself as Martha Olson of Rogers City. Olson stated that she had a phone conversation with an unidentified man who "may own or manage a store in Harrisville." The unidentified man told Olson that a "kid" sold him a box of vintage comic books for $20. After inspecting the comic books, the man concluded that they were "very valuable including one that was worth $385." The Court of Appeals erroneously concluded that this second tip sheet could have assisted the defense in countering the prosecution's claim that no armed robbery occurred at Comics Book World on the day of the murder. The tip sheet establishes that a woman spoke with an unidentified man of an undetermined profession about the man having purchased a box of underpriced comic books from a child. At best, the tip sheet offers weak speculative support for the defense theory regarding an armed robbery. However, the tip sheet provides no link whatsoever between the comic books sold in Harrisville and the robbery that allegedly occurred in Clinton Township. Additionally, one of the fundamental weaknesses in the robbery theory is defendant's own shifting stories. After telling police that $2,000 was missing from the safe and that two boxes of expensive comic books sitting on top of the safe had disappeared, defendant subsequently recanted his story about $2,000 being missing. Moreover, when the police informed defendant of a customer's statement that the customer previously purchased one of the comic books that defendant listed as stolen, defendant again recanted and claimed that the comic book in question was not one of the comic books that disappeared. Accordingly, the second tip sheet would not make a different result more probable on retrial.

The third police tip sheet describes a phone call that police received 16 days after the murder from Pat Flannery who worked with Trustee Services in the Wayne County Sheriff's Department. Flannery reported that he lived with Rita Prog, and he suspected that Rita Prog's former spouse, Marshall Prog, "could somehow be involved" in the murder. According to Flannery, Marshall Prog left his home in Florida and traveled to Michigan a few days before the murder. Flannery stated that Marshall Prog came to Michigan with nothing and that he left with a large sum of money soon after the murder. Flannery also said that when Rita and Marshall Prog were married, the couple "were friends and business acquaintances" with defendant and his wife. Any defense theory regarding Marshall Prog as a viable alternative suspect is highly attenuated. The police did not find any indication of a robbery. Further, the police discovered more than $400 in Barbara's pocket and five pieces of jewelry on her person, including a $2,500 ring. Consequently, the defense is left with the dubious theory that Marshall Prog stole two boxes of expensive comic books from Comics Book World while leaving behind large amounts of cash and jewelry, murdered the victim, fenced the comic books a few days after the crime, and then returned home to Florida. This

---

returned to the phone. Other witnesses discovered Barbara's body in the back of the store some time after 6:00 p.m., and police received a 911 call at 6:22 p.m.

speculative theory involving Marshall Prog simply does not establish that the third tip sheet would make a different result more probable on retrial.

III. CONCLUSION

The jury found beyond a reasonable doubt that defendant shot his wife and fraudulently collected insurance proceeds as a result of her murder. Because none of the three newly discovered police tip sheets would make a different result probable on retrial, the decision to grant defendant a new trial apparently fails the fourth prong of *Cress*, and the trial court appears to have abused its discretion in granting defendant a new trial on the basis of newly discovered evidence. Consequently, I would grant the prosecution's application for leave to appeal.

YOUNG, J., joined the statement of CORRIGAN, J.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to determine whether the newly discovered evidence identified in this case would, in light of the evidence summarized by Justice CORRIGAN in her dissent, "make a different result probable on retrial," *People v Cress*, 468 Mich 678, 692 (2003), and whether, if not, the trial court abused its discretion in granting a new trial based upon such evidence.

PEOPLE v ASHLEY OLIVER, No. 141283; Court of Appeals No. 297513.

Order Denying Motion for Disqualification Entered September 29, 2010:

GRIEVANCE ADMINISTRATOR v MILLER, No. 140081. The complainants' motion for full-Court consideration of the motion for recusal of the Chief Justice is considered, and the complainants' motion to recuse Chief Justice KELLY is denied, because the campaign contribution was within the lawful limits set by the Legislature.

CORRIGAN, J., not participating. I decline to participate in the resolution of this motion for recusal directed at the Chief Justice on the basis of my previously stated objections to the new disqualification rule.

YOUNG, J., not participating. I have voluntarily recused myself from participation in this case because I was general counsel for AAA when a portion of the underlying litigation was pending. Moreover, consistent with my previously stated objections to this Court's new disqualification rule,[1] I otherwise decline to participate in the resolution of any disqualification motion addressed to a justice other than me.

Summary Disposition October 1, 2010:

PEOPLE v TWICHELL, No. 140843; Court of Appeals No. 295449. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the defendant's convictions under MCL 750.145c(2), and we remand this case

[1] See 485 Mich cxxx, clxvii-clxxxv (2009) (YOUNG, J., dissenting); *Pellegrino v Ampco Sys Parking*, 485 Mich 1134, 1155-1165 (2010) (YOUNG, J., not participating).

to the Wayne Circuit Court for proceedings consistent with this Court's opinion in *People v Hill*, 486 Mich 658 (2010).

CORRIGAN, J. (*concurring*). I concur in the order vacating defendant's convictions because this course of action is consistent with the majority opinion in *People v Hill*, 486 Mich 658 (2010). I write separately only to reiterate my disagreement with that majority opinion—which I conclude incorrectly interpreted MCL 750.145c(2)—as expressed by Justice YOUNG's dissenting opinion in *Hill*, which I joined.

YOUNG, J. (*concurring*). Although I recognize that this Court's decision in *People v Hill*, 486 Mich 658 (2010), controls the interpretation of MCL 750.145c, I continue to adhere to the position stated in my dissenting opinion in that case that, like defendant here, a person who makes copies of child pornography thereby "produces" or "makes" child sexually abusive material sufficient to sustain a conviction under MCL 750.145c(2).

PEOPLE v MICHAEL CARPENTER, No. 140989; Court of Appeals No. 292712. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Mecosta Circuit Court to allow the defendant to withdraw his no contest plea because not only was there no evidence presented that the defendant was an originator of child sexually abusive material, but the prosecutor admitted that the defendant was not an originator of child sexually abusive material. Accordingly, the defendant's conviction under MCL 750.145c(2) cannot be sustained. See *People v Hill*, 486 Mich 658 (2010).

CORRIGAN, J. (*concurring*). I concur in the order permitting defendant to withdraw his plea because this course of action is consistent with the majority opinion in *People v Hill*, 486 Mich 658 (2010). I write separately only to reiterate my disagreement with that majority opinion—which I conclude incorrectly interpreted MCL 750.145c(2)—as expressed by Justice YOUNG's dissenting opinion in *Hill*, which I joined.

YOUNG, J. (*concurring*). Although I recognize that this Court's decision in *People v Hill*, 486 Mich 658 (2010), controls the interpretation of MCL 750.145c, I continue to adhere to the position stated in my dissenting opinion in that case that, like defendant here, a person who makes copies of child pornography thereby "produces" or "makes" child sexually abusive material sufficient to sustain a conviction under MCL 750.145c(2).

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 1, 2010:

THORNE v GREAT ATLANTIC & PACIFIC TEA COMPANY, INCORPORATED, No. 140933; Court of Appeals No. 281906. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The Michigan Association for Justice and the Michigan Defense Trial Counsel, Inc. are invited to file briefs amicus curiae. Other persons or

groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

MARKMAN, J. (*concurring*). I concur in the Court's order that oral argument be heard on the application in this case. I write separately only to request that the parties address, at least, the following issues: (1) specifically, the means by which to distinguish under these facts between an ordinary negligence and a premises liability claim, see *James v Alberts*, 464 Mich 12 (2001), and (2) specifically, whether, and in what manner, the "open and obvious" doctrine operates in the context of each of these claims.

CORRIGAN, J., joined the statement of MARKMAN, J.

Leave to Appeal Denied October 1, 2010:

PEOPLE v RICHARD FRYE, No. 140934; Court of Appeals No. 286179.

MARKMAN, J. (*dissenting*). Defendant was convicted of sexually abusing his daughter and three step-daughters and sentenced to life in prison. I would grant leave to appeal to determine whether the undisputed error in this case was harmless.

In *People v Peterson*, 450 Mich 349, 352 (1995), this Court held that "an expert may not vouch for the veracity of a victim." Yet the trial court allowed two expert witnesses to testify that the alleged sexual abuse in this case had occurred and thus that the victims were telling the truth in their allegations. As the Court of Appeals asserted, "[t]he law in this regard is so clear, and the error here so apparent, that we find it remarkable that the prosecutor offered this testimony, that defense counsel failed to object and that the trial court did not, *sua sponte*, prevent its introduction." *People v Frye*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2009 (Docket No. 286179), p 2.

Therefore, the only question before this Court is whether the trial court's error was harmless. I would grant only so that we can more carefully make such an assessment in light of the following: (a) that the oldest victim, CL, who reported the abuse, had made two prior unsubstantiated allegations of abuse against defendant; (b) that the three younger victims initially denied that any sexual abuse had occurred when questioned by their mother and the police; (c) that CL has a lengthy history of mental health problems, lying, and "acting out"; (d) that CL voluntarily continued weekend visits to defendant's house during the period of the alleged abuse; (e) that CL claimed that she continued the visits to protect her sisters, but then allegedly observed ongoing abuse for years without reporting it; (f) that the youngest girl testified that she was "told about" the abuse by CL and her mother; and (g) that the youngest girl now testifies that she was never abused at the same time as the other girls, which directly contradicts other allegations of group abuse.

To be sure, there is also considerable evidence tending to corroborate the victims' allegations, in particular physical evidence found in defendant's home. The question, thus, is whether, absent the two experts' improper corroborative testimony, the evidence summarized above, by

undermining the victims' credibility, would likely have affected the jury's decision to convict defendant. I would grant leave so that we can hear further from the parties.

KELLY, C.J., and CAVANAGH, J., joined the statement of MARKMAN, J.

PROGRESSIVE MICHIGAN INSURANCE COMPANY v SNEDEN, No. 141052; Court of Appeals No. 285265.

MARKMAN, J. (*dissenting*). I respectfully dissent from the denial order. The Court of Appeals' interpretation of who qualifies as an "insured person" under the automobile insurance policy at issue is not a reasonable interpretation. Accordingly, I would reverse the judgment of the Court of Appeals and reinstate the decision of the trial court.

Section 1(d) of the policy defines "insured person" as "you with respect to an accident arising out of the maintenance or use of any vehicle with the express or implied permission of the owner of the vehicle." An insurance policy, like any other contract, must be read as a whole, and its phrases given contextual meaning. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 356 (1999). As the trial court explained, a contextual reading of the above provision naturally leads to the following interpretation: " 'you with respect to an accident arising out of the . . . use of any vehicle. . .' clearly requires that 'you' be *using* 'any vehicle.' "

The conclusion that "you"—the insured defendant Sneden—must be driving, or "using," any vehicle in order to fall within the policy's terms is determinative in this case. The parties agree that the commercial milk truck that defendant was driving at the time of the accident was not a "vehicle" within the policy's express definition of that term, a milk truck exceeding the weight limit of a covered vehicle. And although it is equally without dispute that the *victim*'s Ford Contour was such a "vehicle," which she was using "with the express or implied permission of the owner of the vehicle," this fact is irrelevant when § 1(d) is given its most reasonable and obvious meaning. As the trial court also observed, "insurance agreement limitations *place limits on the insured's vehicle, not the vehicle of whomever they happen to hit*." Quite simply, why would plaintiff, or any insurer for that matter, ever be focused upon whether the *other driver*, with whom its insured happened to collide, had permission to use that "vehicle"? Insurance policies are written with the *insured's* vehicle in mind, not with the vehicle with which the insured serendipitously happens to come into *contact*.

By the logic of the Court of Appeals' interpretation, plaintiff would be equally liable under its policy if Sneden had been walking or flying an airplane and caused damage to another vehicle with which he happened to come into contact. Such an interpretation, in my judgment, is utterly unreasonable, and therefore I would reverse the Court of Appeals.

CORRIGAN, J., joined the statement of MARKMAN, J.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

Reconsideration Denied October 1, 2010:

ONDRUS v CITIZENS INSURANCE COMPANY, No. 140359; Court of Appeals No. 293373. Leave to appeal denied at 486 Mich 924.

CORRIGAN, J. (*dissenting*). For the reasons stated in Justice MARKMAN's dissent from this Court's May 21, 2010, order denying leave to appeal, I would grant defendant's motion for reconsideration and direct the trial court to reconsider its decision certifying the plaintiff class in light of this Court's decision in *Henry v Dow Chem Co*, 484 Mich 483 (2009).

YOUNG, J., joined the statement of CORRIGAN, J.

MARKMAN, J. (*dissenting*). I would grant reconsideration and remand to the trial court for class certification proceedings for the reasons set forth in my dissenting statement in this case. *Ondrus v Citizens Ins Co*, 486 Mich 924, 925 (2010).

YOUNG, J., joined the statement of MARKMAN, J.

Leave to Appeal Denied October 6, 2010:

PEOPLE v HOLLOWAY, No. 139390; Court of Appeals No. 380834.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v GILLIS, No. 140259; Court of Appeals No. 293392.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v ROGER RAY, No. 140641; Court of Appeals No. 294318. The motion to remand is also denied. The defendant's motion for reissuance of judgment was predicated on MCR 6.428, which has no application to the facts of this case. The defendant fails to establish that this rule applies retroactively to his 1993 judgment of sentence. In any event, by its plain terms, MCR 6.428 applies only "[i]f the defendant did not appeal within the time allowed by MCR 7.204(A)(2)," and the rule is otherwise directed exclusively at perfecting a timely appeal of right. The defendant did, in fact, appeal within the time allowed by MCR 7.204(A)(2)(a) because he timely requested the appointment of appellate counsel, and a claim of appeal/order appointing counsel was issued by the circuit court, as contemplated by MCR 6.425(G)(3). Entry of such an order "constitutes a timely filed claim of appeal for the purposes of MCR 7.204," MCR 6.425(G)(3), as it did under the court rules in effect in 1993.

WOLFGANG v DIXIE CUT STONE AND MARBLE, INCORPORATED, No. 140681; Court of Appeals No. 285001.

MILLER APPLE LIMITED PARTNERSHIP v EMMET COUNTY BOARD OF COMMISSIONERS, No. 140803; Court of Appeals No. 286730.

PEOPLE v TROY WILLIAMS, No. 141088; Court of Appeals No. 297062.

BLUE LAKE FINE ARTS CAMP v BLUE LAKE TOWNSHIP ZONING BOARD OF APPEALS, No. 141118; Court of Appeals No. 282799.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

CRANDALL V OAKWOOD HEALTH CARE, INCORPORATED, No. 141150; Court of Appeals No. 295581.

KACHO V KSK HOSPITALITY GROUP, INCORPORATED, No. 141152; Court of Appeals No. 289012.

PEOPLE V SCHNEIDER, No. 141153; Court of Appeals No. 285666.

DIRLA V SENEY SPIRIT STORE & GAS STATION, No. 141280; Court of Appeals No. 292676.

HATHAWAY, J., would grant leave to appeal.

Summary Disposition October 8, 2010:

PEOPLE V JAMES THOMPSON, No. 141129; Court of Appeals No. 296578. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Shiawassee Circuit Court, and we remand this case to the trial court for resentencing. Any movement of the complainant by the defendant was incidental to commission of the crime and did not amount to asportation. See *People v Spanke*, 254 Mich App 642 (2003). On remand, the trial court shall correct the scoring of offense variable 8 (victim asportation or captivity) accordingly. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

YOUNG, J. (*dissenting*). The defendant in this case pleaded guilty to two counts of first-degree criminal sexual conduct, MCL 750.520b, for having sexual relations with his stepdaughter. By his own admission, defendant had sexual contact with the victim some 70 times, beginning when the victim was approximately 13 years old. The sexual contact always occurred either in the defendant's bedroom or the victim's bedroom, a place of relative seclusion where the defendant could victimize his stepdaughter without interruption by defendant's young son.[1] As a result of defendant's guilty plea, he was sentenced to 13-30 years imprisonment.

At issue is the scoring of offense variable 8 (OV 8), which considers the asportation (movement) or captivity of the victim during the commission of a felony. Relevant to this appeal, MCL 777.38 provides that 15 points may be assessed where a victim is "asported to another place of greater danger or to a situation of greater danger . . . ." The record clearly reflects that the victim was moved to accomplish the rapes in the seclusion of a bedroom.

---

[1] In the presentence investigation report, the victim indicated that when the sexual assaults occurred "her mother was always working and her little brother was either home taking a nap or somewhere else in the house."

The majority remands this case to the trial court for resentencing, concluding that OV 8 was misscored because "[a]ny movement of the complainant by the defendant was incidental to the commission of the crime and did not amount to asportation." It is hard to conclude other than that the majority has essentially determined that moving a victim to a bedroom to be raped negates the "asportation" requirement because, after all, a bedroom is a traditionally favored location for sexual activity. Such a location is apparently "incidental to the commission of" rape.

The plain language of the statute indicates that 15 points is properly scored if the victim was asported to a "place of greater danger." Certainly, the victim being asported by the defendant to either bedroom placed her "in greater danger" of being raped, as the asportation resulted in her being sexually assaulted by the defendant in seclusion and away from places where his criminal act might be detected or interrupted.

The majority errs by basing its decision whether OV 8 was properly scored on considerations other than those contemplated by the plain language of the statute. Simply put, there is no "bedroom exception" to OV 8. Because the Court of Appeals reached the only reasonable conclusion based on the facts of the case and the plain language of OV 8, I would deny leave to appeal.

CORRIGAN, J., joined the statement of YOUNG, J.

Leave to Appeal Denied October 8, 2010:

WILLIAMS v CITY OF DETROIT, No. 141101; Court of Appeals No. 290255.

KELLY, C.J. (*concurring*). The Court has denied the application in this case because there were insufficient votes to take any other action. It cannot fairly be said that those who voted to deny leave did so to foster litigation any more than that those who voted to reverse did so to refuse pedestrians access to the Courts. The more likely truth is simply that the justices split evenly in their good-faith reading of the statute.

YOUNG, J., would reverse the judgment of the Court of Appeals.

MARKMAN, J. (*dissenting*). I respectfully dissent and would reverse the judgment of the Court of Appeals.

Plaintiff broke his ankle when he tripped on a defect in a walkway that ran along the river in Detroit, parallel to, but 200 to 300 feet away from, Jefferson Avenue. Plaintiff sued the city of Detroit, relying on the highway exception to governmental immunity found in MCL 691.1402. The trial court granted defendant summary disposition because the walkway was not adjacent to or "on the highway," as required by the definition of "highway" in MCL 691.1041(e). The Court of Appeals determined that the walkway constituted a "trailway," and that it did not have to be "on the highway" in order to fall within the highway exception. *Williams v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued February 25, 2010 (Docket No. 290255).

MCL 691.1402(1) states, in pertinent part:

> The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty,

> extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.

MCL 691.1401(e) provides:

> "Highway" means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts *on the highway*. The term highway does not include alleys, trees, and utility poles. [Emphasis added.]

The Court of Appeals reasoned that "on the highway" at the end of the first sentence of § 1401(e) modified only the word "culvert," which appears immediately before that phrase. The Court invoked the "last antecedent rule," and concluded as a result that "trailways" was not limited by "on the highway," that the walkway where plaintiff fell constituted a "trailway," that "trailway" fell within "highway," and therefore that defendant was obligated to maintain it under the highway exception.

I would reverse the Court of Appeals because its construction of § 1401(e) is illogical and awkward. The Court of Appeals divorced "bridges," "sidewalks," "trailways," and "crosswalks" from the modifier "on the highway," leaving that phrase to describe only "culverts." A more straightforward reading of the sentence—that a public highway "includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway"—would be that *each* of the listed locations in § 1404(e), including sidewalks and trailways, must be "on the highway" in order to fall within "highway." The Court of Appeals' application of the "last antecedent rule" leads to an entirely unreasonable and unwarranted reading of that sentence. The only reason to include "bridges, sidewalks, trailways, crosswalks" within "highway" is that each of these locations are normally on or adjacent to a highway itself. However, under the Court of Appeals' construction, a trailway, sidewalk, bridge, or crosswalk constitutes part of a "highway," without regard to where it is located, resulting in a curtailment of governmental immunity under the highway exception even where a location has nothing at all to do with an actual highway. The walkway where plaintiff fell was not adjacent to or on a highway; rather, it was several hundred feet away from the nearest highway. The Court of Appeals' interpretation is also inconsistent with prior judicial decisions. See, e.g., *Haaksma v Grand Rapids*, 247 Mich App 44 (2001); *Stabley v Huron-Clinton Metro Park Auth*, 228 Mich App 363 (1998).

The highway exception to governmental immunity in MCL 691.1402(1) plainly does not apply. Once again, "it is difficult not to conclude that the only coherent theme of [the majority's] jurisprudence is the fostering of *litigation*." *McCormick v Carrier*, 487 Mich 180, 285 n 58 (2010) (MARKMAN, J., dissenting) (emphasis added). Statutory interpretations of the present sort "virtually guarantee[] as much by introducing uncertainty, doubt, and confusion into the law" and "further[] no discernible legal value of any kind, other than litigation and still more

litigation." *Id*. at 279, 285 n 58. I would reverse the Court of Appeals and reinstate the trial court's grant of summary disposition in favor of defendant.

CORRIGAN, J., joined the statement of MARKMAN, J.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

ALLEN v BELONGA, No. 141657; Court of Appeals No. 295753.

PEOPLE v CAMPBELL, No. 141707; reported below: 289 Mich App 533.

Order Denying Motion for Disqualification Entered October 14, 2010:

BEZEAU v PALACE SPORTS & ENTERTAINMENT, INC, No. 137500; Court of Appeals No. 285593. On order of the Court, the defendant's motion for full-Court consideration of the motion for recusal of Justice DAVIS is considered, and the defendant's motion to recuse Justice DAVIS is denied, for the reasons given in Justice DAVIS's September 28, 2010, statement. 488 Mich 874.

CORRIGAN, J., not participating. I decline to participate in the resolution of this motion for recusal directed at Justice DAVIS on the basis of my previously stated objections to the new disqualification rule.

YOUNG, J., not participating. Consistent with my previously stated objections to this Court's recently adopted disqualification rule,[1] I decline to participate in the recusal motion directed at Justice DAVIS.

Summary Disposition October 15, 2010:

PEOPLE v RUFFIN, No. 139658; Court of Appeals No. 292223. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the St. Clair Circuit Court, and we remand this case to that court and direct that court either to grant the defendant the opportunity to withdraw his plea or to resentence the defendant, on the maximum term only, to a 30-year maximum, for the reason that the defendant was misinformed at his plea hearing that his maximum possible sentence was 30 years, and the prosecution concedes that resentencing the defendant to a maximum of 30 years is an appropriate remedy. See *People v Turski*, 436 Mich 878 (1990) ("A trial court, when sentencing a defendant as an habitual offender, must exercise its discretion in setting the maximum sentence, that is, it is not required by law to increase the maximum sentence."). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

---

[1] See 485 Mich cxxx, clxvii-clxxxv (2009) (YOUNG, J., dissenting); *Pellegrino v Ampco Sys Parking*, 485 Mich 1134, 1155-1165 (2010) (YOUNG, J., not participating).

In re PM, No. 140983; Court of Appeals No. 291874. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Court of Appeals for consideration of the issue raised by the respondent but not addressed by that court during its initial review of this case.

Leave to Appeal Denied October 15, 2010:

SINGER v SREENIVASAN, No. 139799; Court of Appeals No. 284575. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of March 24, 2010. The application for leave to appeal the September 1, 2009, judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v SCHULTZ, No. 141309; Court of Appeals No. 290344.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the Court's order denying the prosecution's application for leave to appeal. I believe that the Court of Appeals may have erred by holding that the trial court abused its discretion in setting aside the order expunging defendant's involuntary manslaughter conviction. I would grant leave to appeal to consider the matter.

In 2002, defendant pleaded no contest to involuntary manslaughter as a result of an altercation in which defendant, after consuming alcohol at a party, punched the victim who fell down a stairwell and suffered injuries resulting in his death. The trial court sentenced defendant to a term of three years probation in January 2003, and defendant was later discharged from probation in January 2006.

In February 2008, the trial court granted defendant's petition under MCL 780.621 to set aside his involuntary manslaughter conviction. Several months thereafter, defendant was arrested and charged with aggravated assault for punching a man at a wedding reception. According to the prosecution, the incident was quite similar to the 2002 incident because defendant had been consuming alcohol and "sucker punched" a man he did not know. Defendant subsequently pleaded guilty to aggravated assault.

The prosecution then filed a motion for relief from judgment under MCR 2.612, requesting the trial court to reinstate defendant's involuntary manslaughter conviction. The trial court granted the motion under MCR 2.612(C)(1)(c), which provides in pertinent part:

> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> * * *

> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

The trial court reasoned that a failure to grant the prosecution's motion would "be essentially a fraud on the public." Transcript of September 30, 2008, motion hearing, p 14. The Court of Appeals reversed on the basis that the trial court abused its discretion in setting aside the expungement order on the basis of MCR 2.612(C)(1)(c). The prosecution then sought leave to appeal with this Court.

I agree with the Court of Appeals that the prosecution did not establish evidence of fraud, misrepresentation, or other misconduct within the meaning of MCR 2.612(C)(1)(c). However, MCR 2.612(C)(1)(f) permits a trial court to grant a motion for relief from judgment for "[a]ny other reason justifying relief from the operation of the judgment." Further, MCL 780.621 provides, in relevant part:

> (1) Except as provided in subsection (2), a person who is convicted of not more than 1 offense may file an application with the convicting court for the entry of an order setting aside the conviction.
>
> * * *
>
> (9) If the court determines that the circumstances and behavior of the applicant from the date of the applicant's conviction to the filing of the application warrant setting aside the conviction and that setting aside the conviction is consistent with the public welfare, the court may enter an order setting aside the conviction. *The setting aside of a conviction under this act is a privilege and conditional and is not a right*. [Emphasis added.]

In my view, the language of MCL 780.621(9), which sets forth that "[t]he setting aside of a conviction under this act is a privilege and conditional and is not a right," permits a trial court discretion to reinstate an expunged conviction. Therefore, under MCR 2.612(C)(1)(f), and in light of the language in MCL 780.621(9), the trial court's decision to set aside the order expunging defendant's involuntary manslaughter conviction was within the range of principled outcomes when considering defendant's subsequent conviction of an additional offense involving assault. See *People v Blackston*, 481 Mich 451, 467 (2008). Thus, despite its failure to cite to the appropriate provision of the court rule, the trial court did not abuse its discretion. Accordingly, I respectfully dissent from this Court's order denying leave to appeal and would grant leave.

ZAVODSKY v ZAVODSKY, No. 141586; Court of Appeals No. 296523.

Rehearing Denied October 15, 2010:

UNIVERSITY OF MICHIGAN REGENTS v TITAN INSURANCE COMPANY, No. 136905. Reported at 487 Mich 289.

KELLY, C.J. (*concurring*). I concur in the order denying rehearing. I continue to believe that the majority opinion, which I authored, correctly overruled the erroneous analysis of the interplay between MCL 600.5851(1) and the one-year-back rule in MCL 500.3145 made in *Cameron v Auto Club Ins Assn*.[1]

Cameron characterized the one-year-back rule as a damages-limiting provision and not a statute of limitations. This rationale was the sole basis for the Court of Appeals' decision to apply *Cameron* to a different statute, MCL 600.5821(4), in *Liptow v State Farm Mut Auto Ins Co*.[2] Thus, as the majority opinion in this case correctly observed, evaluating the soundness of *Liptow* necessitated reevaluating the reasoning in *Cameron*.

The parties believed that *Cameron* need not be reached in deciding this case. However, this agreement was premised on a facile distinction between MCL 600.5851, the statute at issue in *Cameron*, and MCL 600.5821(4), the statute at issue in this case. After extensive analysis, a majority of the justices could not agree with that distinction and found that the *Cameron* rationale lay at the heart of the legal error before us. Hence, reaching back to *Cameron* was both necessary and appropriate.

Moreover, as important as our ruling in this case is, it is hardly earth-shattering and does nothing to undermine no-fault in this state. Unlike *Cameron*, which did represent a sea change in the law, our decision here simply restored the law to its pre-2006 state. Interestingly, the law had existed in that state as far back as 1982[3] and no-fault did not collapse under its own weight.

I write also to address our opinion's use of the word "incompetent" rather than "insane" in discussing MCL 600.5851(1). This was not improper nor was it intended to expand the scope of MCL 600.5851(1). Indeed, I would not hesitate to vote to grant rehearing if I thought there was a need for clarification on this point. However, there are several reasons why the opinion's use of "incompetent" in place of "insane" is not a basis for granting rehearing. First, the legally recognized definition of "incompetent" is consistent with the statutory definition of "insane" in MCL 600.5851(2). Both terms contemplate persons who are unable to comprehend their legal rights.[4] Second, there is nothing novel about using these terms interchangeably. The United States Supreme Court and numerous other courts, have done so for years.[5]

Finally, it is pure speculation to predict the economic consequences of our decision. Defendant claims that it will inevitably lead to higher

---

[1] *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006).

[2] *Liptow v State Farm Mut Auto Ins Co*, 272 Mich App 544 (2006).

[3] *Geiger v Detroit Auto Inter-Ins Exch*, 114 Mich App 283 (1982).

[4] Along with the definitions offered by the dissents, "incompetent" is defined as "not legally qualified." *Random House Webster's College Dictionary* (2001).

[5] *Panetti v Quarterman*, 551 US 930 (2007); see also, e.g., *BASF Corp v Symington*, 512 NW2d 692, 695 n 2 (ND, 1994).

insurance premiums for Michigan drivers. No one is omniscient regarding when or why insurance companies choose to raise or lower premiums. However, the practical effects of our decisions generally do not dictate this Court's reading of statutory language. This is a point with which at least one dissenting justice agrees.[6]

Our decision, as always, was premised on our best efforts to discern the Legislature's intent in enacting the statutes we were asked to review. The public would be misled if it believed we had any other motivation.

For these reasons, I concur in the order denying rehearing and reaffirm my support for the majority opinion in this case.

CORRIGAN, J. (*dissenting*). I would grant defendant's motion for rehearing. Defendant identifies a palpable error in the majority's analysis with serious ramifications for the affordability of state-mandated no-fault automobile insurance in Michigan.

In overruling *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006), the majority inaccurately described the class of individuals protected by the tolling provision in MCL 600.5851(1). The statute protects a person who "is under 18 years of age or insane at the time the claim accrues." The majority distorted this clear language by repeatedly using the term "incompetent" interchangeably with "insane." Whereas "insane" is statutorily defined as "a condition of mental derangement" that prevents a person from comprehending his rights, the term "incompetent" includes persons who are not properly qualified, capable, or legally fit to make a decision. MCL 600.5851(2); *Websters II New College Dictionary* (2005). Thus, the term "incompetent" has a potentially far broader reach than "insane," thereby expanding the class of protected persons beyond those suffering from insanity.

The practical ramifications of the majority's error in overruling *Cameron* include potentially higher premiums for all Michigan motorists who must by law purchase no-fault automobile insurance. Defendant has documented that from 1978 through 2009, the Michigan Catastrophic Claims Association (MCCA) received a total of 24,533 claims, nearly half of which involved a brain injury, the type of injury most likely to trigger the tolling provision in MCL 600.5851. By expanding that provision beyond the reach of its plain language, the majority permits a new universe of claims for accidents that occurred decades ago, claims that will ultimately be paid by the public through increased premiums.

The MCCA already pays out more than $700 million per year, and its annual per vehicle assessment recently rose from $124.89 in 2009/2010 to $143.09 for 2010/2011. Defendant argues that this assessment will rise again due to the majority's decision in this case, further threatening the viability of Michigan's mandatory no-fault system.

---

[6] See *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 37 (2009) (YOUNG, J., dissenting) ("My point is not that our decision should be premised on keeping no-fault insurance affordable.").

Accordingly, I would grant defendant's motion for rehearing to correct the majority's distortion of Michigan's tolling statute, particularly in light of the potentially costly ramifications of this error.

YOUNG, J. (*dissenting*). Today this Court denies rehearing in this case notwithstanding the fact that, in construing MCL 600.5851(1), the majority opinion repeatedly and expressly substituted its preferred language for that chosen by the Legislature. In denying rehearing the Court also reaffirms the erroneous interpretation the majority gave to MCL 600.5821(4) in its original opinion in this case. I dissent from the decision to deny rehearing because I would correct the original opinion so that it relies on the actual statutory language, and then interpret those words as clearly intended by the Legislature and as this Court had already done in *Cameron v Auto Club Ins Ass'n*.[1]

Demonstrating the characteristic overreach exhibited by the majority last term and the resultant overbreadth of its opinions,[2] the majority used this case as a handpicked vehicle to overrule *Cameron v Auto Club Ins Ass'n*. In *Cameron*, this Court had recently held that the minority and insanity tolling provision of MCL 600.5851(1), which only addresses when a person may "bring [an] action," does not prevent the application of the Revised Judicature Act's one-year-back rule because that rule is a damages-limiting provision and not a statute of limitations.[3] Curiously, the majority reached this issue in this case even though the facts here involve neither a person who was mentally insane nor a person under the age of 18. Indeed, in a rare moment of agreement between adversaries before this Court, both plaintiff and defendant stated that the Court need not reach the *Cameron* issue in order to provide a favorable result to either party in this case. Undeterred, the majority nonetheless overruled *Cameron*, erasing the statutory distinction between statutes of limitations and damages-limiting provisions as they relate to the statutory saving provision. The majority held that the saving provision "grant[s] infants and incompetent persons one year after their disability is removed" the ability to bring an action to recover personal protection benefits.[4]

Apart from the errors of statutory interpretation in coming to this result, the majority's decision is patently erroneous because MCL 600.5851(1) reaches only the mentally insane, not the mentally incompetent, as the majority's opinion contrarily and repeatedly states.[5] The

---

[1] 476 Mich 55 (2006).

[2] See *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 323-325 (2010) (YOUNG, J., dissenting).

[3] *Cameron*, 476 Mich at 61-62; see also *Howard v General Motors Corp*, 427 Mich 358, 385-386 (1986) (lead opinion of BRICKLEY, J.) (explaining that a one-year-back rule is not a statute of limitations).

[4] *Univ of Mich Regents*, 487 Mich at 298.

[5] The majority opinion used the term "incompetent" nine times throughout its opinion. Ironically, it used "insane" only once—when quoting the statutory language itself. See *id.* at 295 n 9.

two terms have distinct meanings, particularly when employed in the legal sense. "Insane" is defined by statute: "The term insane as employed in this chapter means a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know . . . ."[6] Distinctly, "incompetent" is defined as "[c]hiefly of a person: of inadequate ability or fitness; lacking the requisite capacity or qualification; incapable."[7] Thus, "insanity" denotes a severe involuntary medical condition that removes any ability for an afflicted person to know his rights, while "incompetent" merely indicates a person who is not competent or unqualified in a certain regard. Therefore, those who are mentally insane will necessarily also be incompetent, but those who are incompetent need not necessarily be insane. And this is the chief problem with the majority opinion's repeated use of a nonstatutory term: by using "incompetent" where the statute employs "insane," the opinion unnecessarily created obvious disharmony between the words of the statute and the controlling caselaw of this Court interpreting those words. Such disharmony will almost certainly cause confusion in future cases regarding the applicability of the one-year-back rule to the incompetent.

And so, in this case, on an issue of the majority's own creation—an issue not even related to the case at hand—the majority has inexplicably attempted to rewrite MCL 600.5851(1) by broadening the class of individuals covered from those who are insane to those who are merely incompetent. There is perhaps no clearer example than this case of this majority's demonstrated indifference to the actual words of a statute and the legislative process that considers, debates, compromises, and ultimately selects those words.[8] Neither the author of the majority's opinion nor the justices who today sanction that opinion by denying rehearing deign to explain why it is appropriate for this Court to substitute a new protected category of persons for the one the Legislature actually chose. Once again in Michigan, judicial preferences trump legislative ones.

Unfortunately, the majority's legal errors do not end there. By overruling *Cameron*, the majority generally eliminated the statutory distinction between statutes of limitations and clauses limiting damages, and then applied this new rationale to its interpretation of MCL 600.5821(4)—the savings provision affecting political entities relevant to

---

[6] MCL 600.5851(2). A common dictionary definition is in accord: "Insane: 1. A. In a state of mind that precludes normal perception and behavior, and ordinary social interaction; psychotic. B. Reserved or intended for the use of mentally ill people." *Shorter Oxford English Dictionary* (6th ed).

[7] *Shorter Oxford English Dictionary* (6th ed).

[8] Even the cases on which the majority relied as authority for its statutory interpretation properly used "insane" rather than "incompetent." See *Lambert v Calhoun*, 394 Mich 179 (1975); *Geiger v DAIIE*, 114 Mich App 283 (1982).

this case. This decision is clearly erroneous, as Justice MARKMAN noted in his vigorous dissent to the original opinion:

> While the RJA, specifically MCL 600.5821(4), states that an action by the state or one of its political subdivisions "may be *brought* at any time without limitation," the no-fault act, specifically MCL 500.3145(1), states that the claimant "may not *recover* benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." (Emphasis added.) Having the right to *bring* a cause of action is not the equivalent of having the right to *recover* an unlimited amount of damages. Therefore, when these two provisions are read together, it is clear that while a political subdivision may *bring* an action at any time, it cannot *recover* benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. In other words, MCL 600.5821(4), which pertains only to *when* an action may be commenced, does not preclude the application of the one-year-back rule, which only limits *how much* can be recovered after the action has been commenced.[9]

Yet, in interpreting this statute and applying it in light of a recently decided precedent by this Court, the majority held otherwise and overruled that precedent.

In addition to the majority's interpretive errors, the enormous uncertainty created by rulings such as this should shock the members of the public and our Legislature. By overruling *Cameron* and erasing the statutory distinction between statutes of limitations and clauses limiting damages, the majority worked to undo what has been called the grand "compromise" of Michigan's no fault insurance regime. In summary, Michigan is the only jurisdiction in the nation with a no-fault automobile insurance system with mandatory unlimited lifetime medical benefits; in exchange, the Legislature imposed restrictions and regulations to protect the system's long-term viability. This Court's decision in *Cameron*, and decisions by the Court of Appeals such as *Liptow*[10] and the opinion below in this case[11] that correctly applied *Cameron*'s accurate interpretation of the statutory terms, enforce the statutory "compromise" by allowing certain entities to bring an action after the period of limitations has run while limiting the damages they can recover. The one-year-back limitation on damages is a mechanism that safeguards the fiscal integrity of the system while maintaining reasonable rates for consumers.

---

[9] *Univ of Mich Regents*, 487 Mich at 339 (MARKMAN, J., dissenting, joined by CORRIGAN and YOUNG, JJ.).

[10] *Liptow v State Farm Mut Auto Ins Co*, 272 Mich App 544 (2006), overruled by *Univ of Mich Regents*, 487 Mich at 293, 308.

[11] *Univ of Mich Regents v Titan Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 276710), rev'd 487 Mich 289 (2010).

Ultimately, while this decision may be good for a few, it will hurt most Michigan citizens who must purchase automobile insurance. The practical effect of this decision is that persons who wish to have their claims reimbursed can wait decades before filing such claims—long after it is possible to challenge the validity of these stale claims due to the loss of witnesses, documents, and other evidence related to a claim. Indeed, plaintiff here waited over six years to seek reimbursement of its claim. The public should not be mistaken as to who will pay for the increased costs that this decision will cause. By its nature, insurance is designed to spread risks and costs over a broad population, and actuaries know how to calculate such risks and account for them when setting premiums. Thus, the increased costs that this decision creates will eventually find their way into every driver's premiums. When this happens, Michigan citizens will know who is responsible for this "judicial gift" of higher automobile insurance premiums.

For these reasons, I respectfully dissent from this Court's decision to deny rehearing in this case.

MARKMAN, J. (*dissenting*). I would grant defendant's motion for rehearing, and then vacate this Court's July 31, 2010, decision and affirm the Court of Appeals for the reasons set forth in Justice CORRIGAN's and Justice YOUNG's dissenting statements, as well as for the reasons set forth in my dissenting opinion in the underlying case. *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 330-348 (2010).

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

Summary Disposition October 20, 2010:

NEVILLE v NEVILLE, No. 140840; Court of Appeals No. 294461. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether the trial court correctly held that the parties' November 14, 1994, divorce judgment limited the plaintiff's survivorship benefit to a proportionate interest based on years of marriage, that the divorce judgment conflicted with the 1995 qualified domestic relations order (QDRO) agreed upon by the parties, that the terms of the divorce judgment should control over the terms of the QDRO, and that the defendant's motion to have the QDRO amended was not time-barred. We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 20, 2010:

HARRIS v GENERAL MOTORS CORPORATION, No. 140241; Court of Appeals No. 285426. On order of the Court, the motion for reconsideration of this Court's April 16, 2010, order is considered, and it is granted. We vacate our order dated April 16, 2010. On reconsideration, the application for leave to appeal the November 24, 2009, judgment of the Court of Appeals is considered. We direct the clerk to schedule oral argument on whether

to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application or reconsideration motion papers.

Leave to Appeal Denied October 20, 2010:

BLUE HARVEST, INCORPORATED v DEPARTMENT OF TRANSPORTATION, Nos. 139554 and 141210; reported below 288 Mich App 267.

BLOOMFIELD FINANCIAL GROUP v HASKINS, No. 140643; Court of Appeals No. 294666.

PEOPLE v SIMS, No. 141216; Court of Appeals No. 288685.

PEOPLE v SPICER, No. 141295; Court of Appeals No. 281173.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v HINTON, No. 141336; Court of Appeals No. 287477.

KELLY, C.J., and CAVANAGH, J., would remand this case to the trial court for the reasons stated in the Court of Appeals dissenting opinion.

In re CONTEMPT OF HOLLAND, Nos. 141347 and 141348; Court of Appeals Nos. 295872 and 295873.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v KLAIT, No. 141374; Court of Appeals No. 289522.

PEOPLE v MERVIN BERRY, No. 141389; Court of Appeals No. 297267.

COULTER v GENERAL MOTORS CORPORATION, No. 141411; Court of Appeals No. 296688.

Summary Disposition October 22, 2010:

ANDERSON v HARLEYSVILLE INSURANCE COMPANY, No. 141179; Court of Appeals No. 296960. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the December 22, 2009, opinion and order of the Cheboygan Circuit Court, and we remand this case to that court for reconsideration in light of *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289 (2010), overruling *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006). We do not retain jurisdiction.

CORRIGAN, J. (*concurring*). I concur in this Court's decision to remand this case in light of *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289 (2010). However, I write separately to note that I continue to adhere to the positions stated in Justice MARKMAN's dissenting opinion in that case, which I joined, as well as my statement dissenting from this Court's decision to deny rehearing in that case. See *Univ of Mich Regents*, 487 Mich at 330-348 (MARKMAN, J., dissenting); *Univ of Mich Regents*

v Titan Ins Co, 488 Mich 893, 895-896 (2010) (CORRIGAN, J., dissenting).

YOUNG, J. (*concurring*). I concur in this Court's decision to remand this case in light of *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289 (2010). However, I write separately to note that I continue to adhere to the positions stated in Justice MARKMAN's dissenting opinion in that case, which I joined, as well as my statement dissenting from this Court's decision to deny rehearing in that case. See *Univ of Mich Regents*, 487 Mich at 330-348 (MARKMAN, J., dissenting); *Univ of Mich Regents v Titan Ins Co*, 488 Mich 893, 896-899 (2010) (YOUNG, J., dissenting). In particular, I note that the uncorrected confusion created by the majority opinion's use of "incompetent" where the statute plainly uses "insane" may prove especially troubling in cases such as this.

PEOPLE v BARKLEY, No. 139194; Court of Appeals No. 283458. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *People v Feezel*, 486 Mich 184 (2010). The remand is limited to the first issue raised by the defendant, regarding her conviction under MCL 257.625(4) and (8). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

CORRIGAN, J. (*dissenting*). I would deny defendant's application for leave to appeal or, in the alternative, grant the application in order to address the viability and applicability of this Court's decision in *People v Feezel*, 486 Mich 184 (2010).

THIS COURT'S *FEEZEL* DECISION

The substance 11-carboxy-tetrahydrocannabinol (11-carboxy-THC) is a metabolite of marijuana indicating recent ingestion of the drug. *Feezel*, 486 Mich at 210. In *Feezel*, this Court concluded that a defendant may not be found guilty of operating a motor vehicle and causing death with the presence of a schedule 1 controlled substance in his body, MCL 257.625(4) and (8), although tests reveal that he had 11-carboxy-THC in his blood at the time of the fatal accident. *Id.* at 211-212. In so holding, the Court overruled in part *People v Derror*, 475 Mich 316 (2006). I joined Justice YOUNG's dissent with regard to this aspect of the *Feezel* opinion because I concluded, as did a majority of the Court in *Derror*, that 11-carboxy-THC is a schedule 1 controlled substance as defined by MCL 333.7212(1)(c) (listing marijuana as a schedule 1 controlled substance) and MCL 333.7106(3) (defining "marijuana" as including "every compound" and "derivative" of the plant *Cannabis sativa* L.).

The trouble caused by the *Feezel* decision is worthy of this Court's serious attention. Most significantly, state police officials report that, in the wake of recent increases in accidents involving drug use, the *Feezel*

opinion "leaves law enforcement officers in a legal limbo."[1] In the words of Sgt. Christopher Hawkins, legislative liaison for the Department of State Police, as reported by the *Detroit News*: "We're in a frustrating situation"; "It's almost like the courts are saying that we can arrest if we find marijuana on you, but it's different if we find marijuana in you." Accordingly, I urge the Court to consider whether *Feezel* was wrongly decided and whether the clear *Derror* rule—which acknowledged that all derivatives of THC are schedule 1 substances—in fact defied practical workability, as the *Feezel* majority claimed. *Feezel*, 486 Mich at 215. In truth, it seems that *Feezel* defies practical workability!

THE IMPACT OF *FEEZEL* HERE

This case well illustrates the potential confusion wrought by the *Feezel* decision. Defendant, who was driving with THC in her system, ran a stop sign and collided with a pick-up truck that had the right of way at the intersection. Two passengers in defendant's car—her six-year-old son and her adult friend—were killed. As a result, a jury convicted defendant of two counts of negligent homicide and one count of operating a motor vehicle and causing death while having a controlled chemical substance (marijuana) in her body, MCL 257.625(4) and (8). Under *Derror*, defendant's guilt of this last offense was clear. But *Feezel* attempted to distinguish one metabolite of marijuana, 11-carboxy-THC, and prohibit it from being dubbed a controlled substance. Accordingly, the nature of defendant's offense is now unclear. An expert testified that defendant's urine contained a sufficient amount of THC—at least 50 nanograms per milliliter—to test positive for the substance. But it is unclear from the record provided to this Court *which* metabolite or metabolites of THC were measured. All metabolites of THC indicate ingestion of marijuana, and defendant did not contest at trial which metabolite or metabolites appeared in her system.

Moreover, it appears that revisiting this question—which was unanticipated by the parties because it was invented by the *Feezel* Court after defendant's convictions entered—would be unlikely to have any effect on this case. Not only did defendant fail to contest which metabolite or metabolites were in her system, but her primary argument on appeal would fail regardless of which metabolites were present. She argues that the record failed to show that she *knew* THC was still in her system, apparently because the record was silent with regard to whether she knew her driving was measurably impaired by marijuana. But the prosecutor was not required to prove that she knew she was impaired by a controlled substance; mere presence of "any amount" of the substance

---

[1] Tom Greenwood, *Ruling clouds pot smoking, driving law*, Detroit News, July 29, 2010, available at <http://detnews.com/article/20100729/METRO/7290387/Ruling-clouds-pot-smoking--driving-law> (accessed August 30, 2010).

in a person's body is necessary for conviction. *Derror*, 475 Mich at 334.[2] The person's errant *driving*, not the person's impairment due to intoxication, must have caused the death. *Id.* at 333. Defendant effectively argues that she decided to gamble by driving after an indefinite period of time had passed since she ingested the marijuana but she should not be liable because, having not tested herself for THC before getting behind the wheel, she did not know with certainty whether THC remained in her system. This argument is irrelevant under the statute even in the wake of the *Feezel* decision. Finally, I note that defendant was paroled in June 2010 after serving her 2½-year minimum sentence. She is scheduled to be discharged from parole by December 2011.

YOUNG and MARKMAN, JJ., joined the statement of CORRIGAN, J.

Leave to Appeal Denied October 22, 2010:

In re SORRELL, No. 141857; Court of Appeals No. 295642.

VELEZ v TUMA, No. 138952; reported below: 283 Mich App 396.

MARKMAN, J. (*dissenting*). I would grant defendant's application for leave to appeal because he has raised a substantial issue that warrants consideration by this Court. Plaintiff sued the defendant doctor, as well as other defendants, for medical malpractice. She settled with the other defendants and received $195,000 for her injury. After a jury verdict, she then received $394,200 from the defendant doctor. Thus, her total recovery was $589,200. However, this recovery may be contrary to MCL 600.1483(1), which at the time of the verdict capped at $394,200 "the total amount of damages for non-economic loss recoverable by . . . plaintiff[], resulting from the negligence of all defendants."

The following are not in dispute: (1) liability here was joint and several, with each defendant being liable for the full amount, MCL 600.6304(6)(a); (2) a jury returned a verdict for plaintiff in the amount of $1,524,831.86; (3) the collateral source rule reduced plaintiff's economic damages to $0, MCL 600.6303(1); (4) the noneconomic damages cap outlined in MCL 600.1483(1) reduced plaintiff's noneconomic damages to $394,200; and (5) defendant

---

[2] The Legislature could have had many plausible reasons for defining the offense this way. Perhaps most notably, the Legislature may have taken into account that blood or urine tests conducted after an accident can establish with precision neither the amount of the controlled substance that was present, nor the precise degree of the offender's impairment, at the time the offender's driving killed the victim. This may be the reason for the Legislature's decision to draw the strict evidentiary line evident in the language of MCL 257.625(8), prohibiting a person from operating a vehicle "if the person has in his or her body any amount of a controlled substance listed in schedule 1 . . . ." Although after-the-fact tests cannot always establish the level of the offender's intoxication at the time he killed someone, such tests can reliably establish that he ingested a controlled substance and, some time later, nonetheless chose to drive.

was entitled to a setoff of the amount of the settlement plaintiff received from the other defendants, $195,000. The open question is *when* the setoff should be applied—after the jury verdict, which will be reduced to the damages cap, or after the verdict has been reduced by the damages cap in the final judgment? The answer to this question will cost one of the parties $195,000.

Because there is no clear provision concerning which of these reductions is to be made first, and because both parties have raised significant arguments, I would grant leave to appeal on this question.

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

Rehearing Denied October 22, 2010:

BEZEAU v PALACE SPORTS & ENTERTAINMENT, INC, No. 137500. Reported at 487 Mich 455.

YOUNG, J. I would grant rehearing and reverse the decision of the Court of Appeals for the reasons set forth in my dissenting opinion in this case, 487 Mich 455, 478-484 (2010).

CORRIGAN and MARKMAN, JJ., joined the statement of YOUNG, J.

Statement Regarding Decision on Motion for Disqualification Entered October 25, 2010:

DUMAS v AUTO CLUB INSURANCE ASSOCIATION, No. 141355; Court of Appeals No. 279149; NYLAND v LOPATIN MILLER, FREEDMAN, BLUESTONE, ERLICH, ROSEN & BARTNICK, PC, No. 141356; Court of Appeals No. 286342; ALARIE v LOPATIN, MILLER, FREEDMAN, BLUESTONE, ERLICH, ROSEN & BARTNICK, PC, No. 141357; Court of Appeals No. 286343; DECKERS v MILLER, No. 141358; Court of Appeals No. 286344; and DZIADZIOLA v MILLER, No. 141359; Court of Appeals No. 287143.

KELLY, C.J. I deny appellants' motion for my recusal. No objective appearance of impropriety arises from the fact that appellee Sheldon Miller made the contribution he did to my 2004 reelection campaign committee. This is because the contribution was lawful,[1] and no other grounds are alleged that could give rise to the appearance of impropriety. Moreover, I am not biased for or against any party or counsel involved in this action.

---

[1] Appellants cite the recommendations of the ABA Task Force on Lawyer's Political Contributions as a basis for my recusal. Appellants' motion, p 1,¶ 5. The findings of the ABA task force recommend that a judge disqualify himself or herself when "a lawyer . . . or a party to litigation . . . has made a campaign contribution in excess of a jurisdiction's limits . . . ." Appellants ignore the phrase "in excess of a jurisdiction's limits." Here, there is no dispute that Miller's contribution was lawful and within Michigan's campaign contribution limits. Thus, the task force's recommendation has no bearing on this case.

The Michigan Campaign Finance Act's[2] campaign contribution disclosure provisions reflect the Legislature's understanding that, standing alone, an individual's lawful contributions to campaign committees will not undermine the public's confidence in our judiciary. The contribution that Miller made to my campaign committee alone does not indicate any closer relationship between him and me than would ordinarily exist between members of the same bar association.[3] In fact, appellants have not suggested that there exist any indicia, aside from the contribution, that could cause my impartiality in this case to be questioned. And *none does* exist. Miller's single contribution of $3,400 represents a *de minimis* portion of the total amount raised by my campaign committee in 2004: less than one-half of one percent.[4] This small amount does not create an objective appearance of impropriety. In *Caperton v A T Massey Coal, Inc*,[5] the United States Supreme Court ruled on a West Virginia Supreme Court of Appeals justice's refusal to recuse himself. The CEO of a lead defendant in a case before the West Virginia Supreme Court of Appeals had contributed $3.5 million to the justice's campaign. The refusal to recuse was held to constitute a violation of the due process clause of the Fourteenth Amendment. However, given the obvious difference in size between the contribution at issue in *Caperton* and Miller's contribution here, one could not reasonably analogize the two cases.

Thus, Miller's contribution, absent any indicia of an appearance of impropriety, does not mandate my recusal, and the *Caperton* decision does not require it, either. In any event, appellants do not argue that *Caperton* mandates my recusal. Nor do they allege that Miller's campaign contribution and my participation in this case amount to a due process violation.

As a second basis for my recusal, appellants claim that, at the time of his donation, "Miller was a defendant in three of the four malpractice actions [at issue in this case] . . . and was embroiled in the attorney fee dispute with Appellant Andris, all of which were destined to be presented in some fashion before this . . . Court . . . ."[6] This is also an insufficient basis for recusal for several reasons. Miller was not a party to any litigation that was before the Michigan Supreme Court when he made the contribution in question. Moreover, it is pure speculation for appellants now to assert that cases which had only just begun when Miller made his contribution would one day come before this Court. And it requires one

---

[2] MCL 169.201 *et seq*.

[3] See, e.g., *Frade v Costa*, 342 Mass 5, 8 (1961).

[4] The Committee to Reelect Supreme Court Justice Marilyn Kelly raised $728,800.45 from over 2,200 individual contributions. $3,400.00/$728,800.45 = 0.004665, or 0.4665%. See Justice Kelly's Dissolution of Candidate Committee Statement ("Post-General CS Diss(e)"), filed December 12, 2004, available at <http://miboecfr.nictusa.com/cgi-bin/cfr/com_det.cgi?com_id=508277>.

[5] *Caperton v A T Massey Coal Co, Inc*, 556 US 868; 129 S Ct 2252 (2009).

[6] Appellants' motion, p 1, ¶ 3.

further leap of logic to believe that Miller's contribution would, years later, create an objective appearance of impropriety. MCR 2.003(C)(1) does not support such logical leaps. Finally, when Miller made his contribution, I had no knowledge of the litigation involving him that had been filed in other courts.

In sum, no objective appearance of impropriety arises solely because Miller made the lawful contribution he did to my 2004 reelection campaign committee. Accordingly, I deny appellants' motion for my recusal.

Summary Disposition October 26, 2010:

GARCIA v ESTATE OF DOYLE, No. 138019; Court of Appeals No. 281233. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to the Court of Appeals for reconsideration in light of *McCormick v Carrier*, 487 Mich 180 (2010).

CORRIGAN, J. (*concurring*). I concur in the order remanding for reconsideration under *McCormick v Carrier*, 487 Mich 180 (2010), because the majority opinion in *McCormick* altered the criteria for determining whether an injured plaintiff meets the serious impairment threshold in MCL 500.3135(7). But I reiterate my disagreement with the *McCormick* majority's analysis for the reasons expressed in Justice MARKMAN's dissent in that case, which I joined. I continue to conclude that the *McCormick* majority misinterpreted MCL 500.3135(7), thus encouraging litigation that is expressly prohibited by the motor vehicle no-fault insurance act and upsetting the Legislature's clear intent to provide Michigan citizens with timely, automatic benefits for injuries sustained in auto accidents while avoiding costly, unnecessary litigation.

YOUNG, J. (*concurring*). Although I recognize that this Court's decision in *McCormick v Carrier*, 487 Mich 180 (2010), now controls when a person may recover in tort for noneconomic loss under the no-fault act, I continue to adhere to the position stated in Justice MARKMAN's dissenting opinion in that case, which I joined.

MCMANIGAL v LEVOSINSKI, No. 138447; Court of Appeals No. 283030. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to the Court of Appeals for reconsideration in light of *McCormick v Carrier*, 487 Mich 180 (2010).

CORRIGAN, J. (*concurring*). I concur in the order remanding for reconsideration under *McCormick v Carrier*, 487 Mich 180 (2010), because the majority opinion in *McCormick* altered the criteria for determining whether an injured plaintiff meets the serious impairment threshold in MCL 500.3135(7). But I reiterate my disagreement with the *McCormick* majority's analysis for the reasons expressed in Justice MARKMAN's dissent in that case, which I joined. I continue to conclude that the *McCormick* majority misinterpreted MCL 500.3135(7), thus encouraging litigation that is expressly prohibited by the motor vehicle no-fault insurance act and upsetting the Legislature's clear intent to provide

Michigan citizens with timely, automatic benefits for injuries sustained in auto accidents while avoiding costly, unnecessary litigation.

YOUNG, J. (*concurring*). Although I recognize that this Court's decision in *McCormick v Carrier*, 487 Mich 180 (2010), now controls when a person may recover in tort for noneconomic loss under the no-fault act, I continue to adhere to the position stated in Justice MARKMAN's dissenting opinion in that case, which I joined.

JOHNSON V WAUSAU INSURANCE COMPANY, No. 138815; reported below: 283 Mich App 636. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and the October 11, 2007, order of the Genesee Circuit Court, and we remand this case to the Genesee Circuit Court for reconsideration in light of *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289 (2010).

CORRIGAN, J. (*concurring*). I continue to adhere to the analyses set forth in Justice MARKMAN's dissenting opinion in *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 330-348 (2010), and my statement dissenting from the denial of rehearing in that case, 488 Mich 893, 895-896 (2010).

YOUNG, J. (*concurring*). Although I concur in this Court's decision to remand this case in light of *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289 (2010), I continue to adhere to the positions stated in Justice MARKMAN's dissenting opinion in that case, which I joined.

RECKER V CHARTER COMMUNICATIONS HOLDING COMPANY, No. 139096; Court of Appeals No. 284676. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgments of the Court of Appeals and the Grand Traverse Circuit Court, and we remand this case to the trial court for reconsideration in light of *McCormick v Carrier*, 487 Mich 180 (2010).

CORRIGAN, J. (*concurring*). I concur in the order remanding for reconsideration under *McCormick v Carrier*, 487 Mich 180 (2010), because the majority opinion in *McCormick* altered the criteria for determining whether an injured plaintiff meets the serious impairment threshold in MCL 500.3135(7). But I reiterate my disagreement with the *McCormick* majority's analysis for the reasons expressed in Justice MARKMAN's dissent in that case, which I joined. I continue to conclude that the *McCormick* majority misinterpreted MCL 500.3135(7), thus encouraging litigation that is expressly prohibited by the motor vehicle no-fault insurance act and upsetting the Legislature's clear intent to provide Michigan citizens with timely, automatic benefits for injuries sustained in auto accidents while avoiding costly, unnecessary litigation.

YOUNG, J. (*concurring*). Although I recognize that this Court's decision in *McCormick v Carrier*, 487 Mich 180 (2010), now controls when a person may recover in tort for noneconomic loss under the no-fault act, I continue to adhere to the position stated in Justice MARKMAN's dissenting opinion in that case, which I joined.

PLAGGEMEYER V LEE, No. 139101; Court of Appeals No. 284016. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate in part the judgments of the Court of Appeals and the Muskegon Circuit

Court and remand this case to the Muskegon Circuit Court for reconsideration of the defendants' motion for summary disposition regarding whether plaintiff James Plaggemeyer sustained a serious impairment of body function in light of *McCormick v Carrier*, 487 Mich 180 (2010). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

CORRIGAN, J. (*concurring*). I concur in the order remanding for reconsideration under *McCormick v Carrier*, 487 Mich 180 (2010), because the majority opinion in *McCormick* altered the criteria for determining whether an injured plaintiff meets the serious impairment threshold in MCL 500.3135(7). But I reiterate my disagreement with the *McCormick* majority's analysis for the reasons expressed in Justice MARKMAN's dissent in that case, which I joined. I continue to conclude that the *McCormick* majority misinterpreted MCL 500.3135(7), thus encouraging litigation that is expressly prohibited by the motor vehicle no-fault insurance act and upsetting the Legislature's clear intent to provide Michigan citizens with timely, automatic benefits for injuries sustained in auto accidents while avoiding costly, unnecessary litigation.

YOUNG, J. (*concurring*). Although I recognize that this Court's decision in *McCormick v Carrier*, 487 Mich 180 (2010), now controls when a person may recover in tort for noneconomic loss under the no-fault act, I continue to adhere to the position stated in Justice MARKMAN's dissenting opinion in that case, which I joined.

PATREKA V CORDLE, No. 139220; Court of Appeals No. 284216. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgments of the Court of Appeals and the Monroe Circuit Court, and we remand this case to the trial court for reconsideration in light of *McCormick v Carrier*, 487 Mich 180 (2010).

CORRIGAN, J. (*concurring*). I concur in the order remanding for reconsideration under *McCormick v Carrier*, 487 Mich 180 (2010), because the majority opinion in *McCormick* altered the criteria for determining whether an injured plaintiff meets the serious impairment threshold in MCL 500.3135(7). But I reiterate my disagreement with the *McCormick* majority's analysis for the reasons expressed in Justice MARKMAN's dissent in that case, which I joined. I continue to conclude that the *McCormick* majority misinterpreted MCL 500.3135(7), thus encouraging litigation that is expressly prohibited by the motor vehicle no-fault insurance act and upsetting the Legislature's clear intent to provide Michigan citizens with timely, automatic benefits for injuries sustained in auto accidents while avoiding costly, unnecessary litigation.

YOUNG, J. (*concurring*). Although I recognize that this Court's decision in *McCormick v Carrier*, 487 Mich 180 (2010), now controls when a person may recover in tort for noneconomic loss under the no-fault act, I continue to adhere to the position stated in Justice MARKMAN's dissenting opinion in that case, which I joined.

COTRILL V SENTER, No. 139677; Court of Appeals No. 285216. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgments of the Court of Appeals and the Genesee Circuit Court, and we

remand this case to the trial court for reconsideration in light of *McCormick v Carrier*, 487 Mich 180 (2010).

CORRIGAN, J. (*concurring*). I concur in the order remanding for reconsideration under *McCormick v Carrier*, 487 Mich 180 (2010), because the majority opinion in *McCormick* altered the criteria for determining whether an injured plaintiff meets the serious impairment threshold in MCL 500.3135(7). But I reiterate my disagreement with the *McCormick* majority's analysis for the reasons expressed in Justice MARKMAN's dissent in that case, which I joined. I continue to conclude that the *McCormick* majority misinterpreted MCL 500.3135(7), thus encouraging litigation that is expressly prohibited by the motor vehicle no-fault insurance act and upsetting the Legislature's clear intent to provide Michigan citizens with timely, automatic benefits for injuries sustained in auto accidents while avoiding costly, unnecessary litigation.

YOUNG, J. (*concurring*). Although I recognize that this Court's decision in *McCormick v Carrier*, 487 Mich 180 (2010), now controls when a person may recover in tort for noneconomic loss under the no-fault act, I continue to adhere to the position stated in Justice MARKMAN's dissenting opinion in that case, which I joined.

SOWER v REYNOLDS, No. 140491; Court of Appeals No. 291691. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgments of the Court of Appeals and the Ionia Circuit Court, and we remand this case to the trial court for reconsideration in light of *McCormick v Carrier*, 487 Mich 180 (2010).

CORRIGAN, J. (*concurring*). I concur in the order remanding for reconsideration under *McCormick v Carrier*, 487 Mich 180 (2010), because the majority opinion in *McCormick* altered the criteria for determining whether an injured plaintiff meets the serious impairment threshold in MCL 500.3135(7). But I reiterate my disagreement with the *McCormick* majority's analysis for the reasons expressed in Justice MARKMAN's dissent in that case, which I joined. I continue to conclude that the *McCormick* majority misinterpreted MCL 500.3135(7), thus encouraging litigation that is expressly prohibited by the motor vehicle no-fault insurance act and upsetting the Legislature's clear intent to provide Michigan citizens with timely, automatic benefits for injuries sustained in auto accidents while avoiding costly, unnecessary litigation.

YOUNG, J. (*concurring*). Although I recognize that this Court's decision in *McCormick v Carrier*, 487 Mich 180 (2010), now controls when a person may recover in tort for noneconomic loss under the no-fault act, I continue to adhere to the position stated in Justice MARKMAN's dissenting opinion in that case, which I joined.

MILLER v COOPER, No. 140711; Court of Appeals No. 289114. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgments of the Court of Appeals and the Mecosta Circuit Court, and we remand this case to the trial court for reconsideration in light of *McCormick v Carrier*, 487 Mich 180 (2010).

CORRIGAN, J. (*concurring*). I concur in the order remanding for reconsideration under *McCormick v Carrier*, 487 Mich 180 (2010), because the majority opinion in *McCormick* altered the criteria for

determining whether an injured plaintiff meets the serious impairment threshold in MCL 500.3135(7). But I reiterate my disagreement with the *McCormick* majority's analysis for the reasons expressed in Justice MARKMAN's dissent in that case, which I joined. I continue to conclude that the *McCormick* majority misinterpreted MCL 500.3135(7), thus encouraging litigation that is expressly prohibited by the motor vehicle no-fault insurance act and upsetting the Legislature's clear intent to provide Michigan citizens with timely, automatic benefits for injuries sustained in auto accidents while avoiding costly, unnecessary litigation.

YOUNG, J. (*concurring*). Although I recognize that this Court's decision in *McCormick v Carrier*, 487 Mich 180 (2010), now controls when a person may recover in tort for noneconomic loss under the no-fault act, I continue to adhere to the position stated in Justice MARKMAN's dissenting opinion in that case, which I joined.

PEOPLE v ALAN TAYLOR, No. 141166; Court of Appeals No. 295275. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v LYSYUK, No. 141465; Court of Appeals No. 297976. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for correction of the sentence imposed for the defendant's conviction of driving while license suspended, which in this case was a 93-day misdemeanor, MCL 257.904(3)(a), and thus not subject to sentence enhancement pursuant to MCL 769.12(1)(b). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

Leave to Appeal Denied October 26, 2010:

PAQUETTE v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 139582; Court of Appeals No. 279909.

CORRIGAN, J. (*concurring*). I continue to adhere to the analyses set forth in Justice MARKMAN's dissenting opinion in *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 330-348 (2010), and my statement dissenting from the denial of rehearing in that case, 488 Mich 893, 895-896 (2010).

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v CROWE, No. 140452; Court of Appeals No. 294560.

PEOPLE v MULLINS, No. 140516; Court of Appeals No. 286324.

PEOPLE v MULLINS, No. 140518; Court of Appeals No. 286323.

BENSON v VANDERBEKE, NO. 140542; Court of Appeals No. 285318.

WARD-TENBROEKE v MACKENZIE'S ANIMAL SANCTUARY, INCORPORATED, No. 140809; Court of Appeals No. 294557.

KLOIAN v VANFOSSEN, No. 140946; Court of Appeals No. 287812.

PEOPLE v FREDDIE NASH, No. 140950; Court of Appeals No. 295819.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v HORTON, No. 140957; Court of Appeals No. 290009.

PEOPLE v JAMES ROWE, No. 141107; Court of Appeals No. 286711.

PEOPLE v THOMAS TURNER, No. 141109; Court of Appeals No. 294912.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v CHARLES LEWIS, No. 141116; Court of Appeals No. 292832.

PEOPLE v POPE, No. 141117; Court of Appeals No. 294725.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v ETHERTON, No. 141119; Court of Appeals No. 295566.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v MCMILLAN, No. 141126; Court of Appeals No. 295355.

CARLTON BROWN v DEPARTMENT OF CORRECTIONS, No. 141147; Court of Appeals No. 296305.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v LOTT, No. 141164; Court of Appeals No. 296710.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v JOSEPH ROBINSON, No. 141172; Court of Appeals No. 296131.

PEOPLE v BARNARD, No. 141186; Court of Appeals No. 295911.

PEOPLE v ALEX GARCIA, No. 141187; Court of Appeals No. 287275.

MEADOWS v MEADOWS, No. 141191; Court of Appeals No. 288893.

PEOPLE v WATSON, No. 141192; Court of Appeals No. 295936.

PEOPLE v ROBERT SCOTT, No. 141211; Court of Appeals No. 296886.

CHASE v POMILIA, No. 141212; Court of Appeals No. 289680.

CORRIGAN, J. (*concurring*). I concur in the order denying leave because the conclusion of the Court of Appeals majority—that plaintiff's injuries

were sufficient to satisfy the tort threshold in MCL 500.3135(7)—likely would not constitute clear error under this Court's subsequent opinion in *McCormick v Carrier*, 487 Mich 180 (2010). But I reiterate my disagreement with *McCormick* for the reasons expressed by Justice MARKMAN's dissent in that case, which I joined. Further, I agree with the trial court and the Court of Appeals dissent that plaintiff's injuries here clearly do not satisfy the plain language of MCL 500.3135(7), which I think was correctly interpreted in *Kreiner v Fischer*, 471 Mich 109 (2004).

The automobile no-fault act permits a person injured in an automobile accident to sue in tort only if the injury caused by the accident constitutes a "serious impairment of body function," which means "an objectively manifested impairment of an important body function that affects the person's general ability to live his or her normal life." MCL 500.3135(7). Here plaintiff claimed that the accident aggravated preexisting back pain and depression. But, in the words of the dissenting Court of Appeals opinion:

> The record in this case is full of undisputed evidence that the trajectory of plaintiff's normal life has not been affected by the automobile accident. As the trial court noted in its opinion, well before the accident in this case, plaintiff had been determined disabled by the Social Security Administration. In his application for those benefits, which were largely based upon a psychological disability, plaintiff indicated that he could not do virtually all the things he now claims he could not do because of the accident. For instance, for many years before the accident plaintiff had not worked, golfed, fished, boated, or even done many household chores. Indeed, he admittedly stayed in his bedroom on and off for many days, in large part because of his depression. His same life pattern continued after the accident, albeit with some more pain. [*Chase v Pomilia*, unpublished opinion per curiam of the Court of Appeals, issued May 18, 2010 (Docket No. 289680) (MURRAY, J., dissenting), p 2.]

PEOPLE v TIGNEY, No. 141215; Court of Appeals No. 296067.

PEOPLE v COLEMAN, No. 141219; Court of Appeals No. 290162.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v JOHNNY LEE, No. 141223; Court of Appeals No. 297251.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v GRATTON, No. 141224; Court of Appeals No. 295972.

PEOPLE v HULL, No. 141239; Court of Appeals No. 297117.

PEOPLE v REGINALD GREEN, No. 141244; Court of Appeals No. 295518.

PEOPLE v ORANGE TAYLOR, No. 141249; Court of Appeals No. 285958.

PEOPLE v GARRY JONES, No. 141259; Court of Appeals No. 296332.

PEOPLE v ALLEN HUDSON, No. 141260; Court of Appeals No. 295520.

PEOPLE v FRANK, No. 141264; Court of Appeals No. 288797.

PEOPLE v ALSON, No. 141265; Court of Appeals No. 297265.

PEOPLE v FREDRICK BROWN, No. 141268; Court of Appeals No. 289348.

PEOPLE v SEAY, No. 141278; Court of Appeals No. 295971.

PEOPLE v ROBERT CLARK, No. 141281; Court of Appeals No. 289206.

PEOPLE v MELBERT, No. 141287; Court of Appeals No. 295799.

PEOPLE v BENNETT, No. 141288; Court of Appeals No. 296225.

PEOPLE v AUSTIN, No. 141290; Court of Appeals No. 286066.

PEOPLE v CHRETIEN TURNER, No. 141292; Court of Appeals No. 296974.

PEOPLE v AGURS, No. 141300; Court of Appeals No. 297141.

PEOPLE v JAHN, No. 141313; Court of Appeals No. 297212.

PEOPLE v AMERICA NELSON, No. 141318; Court of Appeals No. 287389.

LIVINGSTON v WEST MICHIGAN LAKESHORE ASSOCIATION OF REALTORS, No. 141320; Court of Appeals No. 295580.

PEOPLE v LEONARD CARTER, No. 141321; Court of Appeals No. 290493.

PEOPLE v GALAFATI, No. 141326; Court of Appeals No. 295706.

PEOPLE v BOBBIE JONES, No. 141327; Court of Appeals No. 288737.

PEOPLE v DEPUTY, No. 141335; Court of Appeals No. 297617.

PEOPLE v OLSEN, No. 141342; Court of Appeals No. 288577.

PEOPLE v DELEON NELSON, No. 141353; Court of Appeals No. 281567.

LASALLE BANK MIDWEST v ZLATKIN, No. 141367; Court of Appeals No. 296308.

LAND v L'ANSE CREUSE PUBLIC SCHOOLS BOARD OF EDUCATION, No. 141375; Court of Appeals No. 288612.

PEOPLE v YOUNG, No. 141377; Court of Appeals No. 290264.

PEOPLE v MCQUILLAN, No. 141378; Court of Appeals No. 297079.

RICHARDSON v STATE EMPLOYEES' RETIREMENT SYSTEM, No. 141384; Court of Appeals No. 287779.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v GOODING, No. 141385; Court of Appeals No. 290456.

PEOPLE v SAMUEL BAKER, No. 141390; Court of Appeals No. 289844.

PEOPLE v GRIFFIN, No. 141391; Court of Appeals No. 297711.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v DUKES, No. 141401; Court of Appeals No. 290624.

LEWIS v DEPARTMENT OF CORRECTIONS, No. 141404; Court of Appeals No. 290338.

PEOPLE v KEITH, No. 141419; Court of Appeals No. 276081.

PEOPLE v TESHARRA SMITH, No. 141422; Court of Appeals No. 291177.

PEOPLE v CALLOWAY, No. 141429; Court of Appeals No. 291585.

PEOPLE v RUPERT, No. 141437; Court of Appeals No. 290545.

PEOPLE v WALSH, No. 141441; Court of Appeals No. 297775.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v BERNOUDY, No. 141444; Court of Appeals No. 290383.

PEOPLE v HENRY, No. 141450; Court of Appeals No. 289859.

PEOPLE v MCCOY, No. 141451; Court of Appeals No. 297448.

PEOPLE v RAYMOND JOHNSON, No. 141452; Court of Appeals No. 289066.

PEOPLE v ABRON, No. 141456; Court of Appeals No. 291621.

PEOPLE v WATTS, No. 141458; Court of Appeals No. 297834.

PEOPLE v SYMONE BROWN, No. 141460; Court of Appeals No. 297795.

PEOPLE v KEVIN BUCHANAN, No. 141461; Court of Appeals No. 297585.

PEOPLE v ANTHONY MOORE, No. 141470; Court of Appeals No. 291249.

PEOPLE v PROCTOR, No. 141471; Court of Appeals No. 296074.

MADLEY v CENTEX REAL ESTATE CORPORATION, No. 141475; Court of Appeals No. 292497.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v DAMON ALLEN, No. 141477; Court of Appeals No. 298394.

PEOPLE v FLEMING, No. 141480; Court of Appeals No. 289700.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v PEOPLES, No. 141481; Court of Appeals No. 297785.

HOME-OWNERS INSURANCE COMPANY v BEYDOUN, No. 141483; Court of Appeals No. 290227.

PEOPLE v BORIS, No. 141484; Court of Appeals No. 289847.

MCCRATE v DEPARTMENT OF CORRECTIONS, Nos. 141486, 141487, 141489, and 141490; Court of Appeals Nos. 295537 and 295606.

PEOPLE v FAVORITE, No. 141493; Court of Appeals No. 290380.

PEOPLE v HACKWORTH, No. 141495; Court of Appeals No. 286988.

PEOPLE v SANTURE, No. 141498; Court of Appeals No. 297791.

PEOPLE v WILLIE JONES, No. 141500; Court of Appeals No. 287916.

GENESEE COUNTY TREASURER v HOLMAN, No. 141503; Court of Appeals No. 296812.

PEOPLE v LARRY JOHNSON, No. 141507; Court of Appeals No. 297949.

IACOBESCU v CHASE HOME FINANCE, No. 141523; Court of Appeals No. 296707.

PEOPLE v PILGRIM, No. 141524; Court of Appeals No. 297921.

PEOPLE v MATTHEW DAVIS, No. 141525; Court of Appeals No. 297849.

PEOPLE v ANDRE DAVIS, No. 141528; Court of Appeals No. 298336.

PEOPLE v TYLER, No. 141530; Court of Appeals No. 297897.

PEOPLE v ST CLAIR, No. 141531; Court of Appeals No. 298214.

PEOPLE v JAMES JONES, No. 141541; Court of Appeals No. 289946.

PEOPLE v MICHAEL BARNES, No. 141547; Court of Appeals No. 296199.

PEOPLE v NORTON, No. 141548; Court of Appeals No. 290026.

PEOPLE v ROBERT HANKINS, No. 141552; Court of Appeals No. 291280.

SAVEWAY FOOD CENTER, INCORPORATED v MCNICHOLS REAL ESTATE, LLC, No. 141561; Court of Appeals No. 290614.

PEOPLE v JAY, No. 141575; Court of Appeals No. 290129.

YOHN v UNIVERSITY OF MICHIGAN REGENTS, No. 141589; Court of Appeals No. 294135.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

MORTIMER v ALPENA PROBATE COURT, No. 141606; Court of Appeals No. 290958.

PEOPLE v LEONARD, No. 141825; Court of Appeals No. 299980.

[As amended by order of the Supreme Court entered November 30, 2010—REPORTER.]

CORRIGAN, J. I would sua sponte reconsider the prosecutor's application for leave to appeal in light of a clerical error that was brought to the Court's attention after our order denying leave to appeal entered on October 26, 2010. In this interlocutory appeal, the prosecutor argued that the trial court abused its discretion by excluding from trial videotaped interviews of the defendant by the police. Both the Court of Appeals and this Court denied the prosecutor's applications for leave to appeal. I concurred in this Court's decision in part because it appeared that the prosecutor had failed to provide copies of the videotapes to this Court for review. After our order denying leave entered, however, the prosecutor pointed out that he had offered copies of the tapes to the Court and had indicated their availability on the coversheet of the application. The Court then discovered that an internal filing error prevented the information concerning the tapes' availability from being disseminated to the justices. Because the content of the tapes might affect my decision concerning whether the trial judge properly excluded them from trial, I would reconsider the prosecutor's application in light of their availability.

Reconsideration Denied October 26, 2010:

PEOPLE v RALPH, No. 140608; Court of Appeals No. 295632. Leave to appeal denied at 487 Mich 853.

PEOPLE v JAMES HARDY, No. 140715; Court of Appeals No. 294638. Leave to appeal denied at 487 Mich 854.

PEOPLE v THREET, No. 140892; Court of Appeals No. 295136. Leave to appeal denied at 487 Mich 855.

BURWELL v ATTORNEY GRIEVANCE COMMISSION, No. 140993. Superintending control denied at 487 Mich 858.

PEOPLE v JEFFREY BAKER, No. 141044; Court of Appeals No. 285028. Leave to appeal denied at 487 Mich 858.

SMITH v ALCONA CIRCUIT JUDGE, No. 141111; Court of Appeals No. 294724. Leave to appeal denied at 487 Mich 858.

Superintending Control Denied October 26, 2010:

MACDONALD v ATTORNEY DISCIPLINE BOARD, No. 141542.

BAKIAN v ATTORNEY GRIEVANCE COMMISSION, No. 141555.

Summary Disposition October 27, 2010:

AUTO-OWNERS INSURANCE COMPANY v FERWERDA ENTERPRISES, INCORPORATED, Nos. 140735 and 140738; Court of Appeals No. 277574. By order of July 15, 2010, the Mason Circuit Court was directed to file its clarification of the record on the issue of whether the trial court found that Auto-Owners' claim was frivolous within the meaning of MCR 2.625(A)(2) and MCL 600.2591(3)(a)(*i*) through (*iii*). On order of the Court, the Court having reviewed the findings of the Mason Circuit Court, which found, under MCL 600.2591(3)(a)(*ii*) and (*iii*), that the plaintiff's arguments were inappropriate and devoid of arguable legal merit, the applications for leave to appeal the January 28, 2010, judgment of the Court of Appeals are again considered. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals addressing attorney fees, and we reinstate the trial court's attorney fee award.

SMITTER v THORNAPPLE TOWNSHIP, No. 141085; Court of Appeals No. 294768. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v MICHAEL REID, No. 141597; reported below: 288 Mich App 661. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the Court of Appeals' decision that the circuit court did not have jurisdiction to try the defendant's misdemeanor charge once the felony charge was dismissed on the day of trial. The circuit court was vested with jurisdiction over the misdemeanor charge because the defendant was charged with a felony and a misdemeanor that arose out of the same criminal transaction. Once jurisdiction has properly attached, any doubt is resolved in favor of retaining jurisdiction. *People v Veling*, 443 Mich 23, 32 (1993). Moreover, "any legislative intent to divest jurisdiction once it has properly attached must be clearly and unambiguously stated." *Id*. at 32 n 13, citing *Leo v Atlas Industries, Inc*, 370 Mich 400, 402 (1963). Although MCL 600.8311(a) provides that the district court shall have jurisdiction over misdemeanors punishable by not more than one year in jail, it does not expressly divest the circuit court of jurisdiction in the circumstances of this case. We remand this case to the Court of Appeals for consideration of the defendant's additional issues. We do not retain jurisdiction.

SUNDE v SUNDE, No. 141733; Court of Appeals No. 297127. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court, Family Division, for reconsideration of the plaintiff's motion to change the domicile of the minor children. The trial court made findings of fact and conclusions of law pursuant to MCL 722.31 on the basis of an incomplete factual record. At a minimum, the trial court erred when it disregarded the plaintiff's proffered proof of the defendant's history of domestic violence—factor (e) under MCL 722.31(4). On remand, unless the parties agree to a different procedure, the trial court shall allow both parties to present testimony and evidence in support of their respective claims regarding the statutory factors, as

well as up-to-date information or evidence of other changes in circumstance arising since the trial court's most recent order. The trial court shall then rule on the motion by determining, with the children as the primary focus, whether the plaintiff, as the parent with whom the children have an established custodial environment, has established by a preponderance of the evidence that the change of domicile is warranted. We do not retain jurisdiction.

Leave to Appeal Granted October 27, 2010:

BRONSON METHODIST HOSPITAL v ALLSTATE INSURANCE COMPANY, No. 140301; reported below: 286 Mich App 219.

Summary Disposition October 29, 2010:

PEOPLE v SOARES, No. 137268; Court of Appeals No. 273333. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *People v Feezel*, 486 Mich 184 (2010).

MARKMAN, J. (*concurring*). I concur with the Court's order remanding to the Court of Appeals for reconsideration in light of *People v Feezel*, 486 Mich 184 (2010). In this case, at the time of the fatal accident, the victim was driving a motorcycle with 11-carboxy-tetrahydrocannabinol in his blood. This metabolite of marijuana indicates recent ingestion of the drug. *Id.* at 210. An expert testified that the amount of the metabolite in the victim's blood suggested that his reaction time might have been slowed. Evidence was also presented that the victim was driving 9-10 miles over the speed limit. In light of these facts, the Court of Appeals should determine whether, under the standards set forth in *Feezel*, "the proofs are sufficient to make a question of fact for the jury" on the question of the victim's gross negligence. *Id.* at 196. While I share the dissent's concerns about the portion of *Feezel* that overruled *People v Derror*, 475 Mich 316 (2006), and which has created problems for law enforcement, see *People v Barkley*, 488 Mich 901 (2010), this case involves the application of legal standards articulated in *Feezel* that I supported.

CORRIGAN, J. (*dissenting*). I would grant the prosecution's application for leave to appeal to address the viability and application of this Court's decision in *People v Feezel*, 486 Mich 184 (2010), and to consider the ruling of the Court of Appeals here that evidence of 11-carboxy-tetrahydrocannabinol (11-carboxy-THC) in the victim's blood was relevant evidence.

THIS COURT'S *FEEZEL* DECISION

The substance 11-carboxy-THC is a metabolite of marijuana indicating recent ingestion of the drug. *Feezel*, 486 Mich at 210. In *Feezel*, this

Court concluded that a defendant may not be found guilty of operating a motor vehicle and causing death with the presence of a schedule 1 controlled substance in his body, MCL 257.625(4) and (8), although tests reveal that he had 11-carboxy-THC in his blood at the time of the fatal accident. *Id.* at 211-212. In so holding, the Court overruled in part *People v Derror*, 475 Mich 316 (2006). I joined Justice YOUNG's dissent with regard to this aspect of the *Feezel* opinion because I concluded, as did a majority of the Court in *Derror*, that 11-carboxy-THC is a schedule 1 controlled substance as defined by MCL 333.7212(1)(c) (listing marijuana as a schedule 1 controlled substance) and MCL 333.7106(3) (defining "marijuana" as including "every compound" and "derivative" of the plant *Cannabis sativa* L.).

The trouble caused by the *Feezel* decision is worthy of this Court's serious attention. Most significantly, state police officials report that, in the wake of recent increases in accidents involving drug use, the *Feezel* opinion "leaves law enforcement officers in a legal limbo."[1] In the words of Sgt. Christopher Hawkins, legislative liaison for the Department of State Police, as reported by the *Detroit News*: "We're in a frustrating situation"; "It's almost like the courts are saying that we can arrest if we find marijuana on you, but it's different if we find marijuana in you." Accordingly, I would grant to consider whether *Feezel* was wrongly decided and whether the clear *Derror* rule—which acknowledged that all derivatives of THC are schedule 1 substances—in fact defied practical workability, as the *Feezel* majority claimed. *Feezel*, 486 Mich at 215. In truth, it seems that *Feezel* defies practical workability!

THE RELEVANCE OF 11-CARBOXY-THC IN THE VICTIM'S BLOOD

The central issue in this case was not whether the defendant had a schedule 1 substance in his blood. The defendant here was intoxicated by alcohol, not marijuana, when he ran a stop sign at a high rate of speed, causing the victim's motorcycle to crash into the defendant's SUV, killing the victim. The defendant was charged with manslaughter, MCL 750.321, and operating a vehicle while intoxicated causing death, MCL 257.625(1) and (4). At issue on appeal was whether 11-carboxy-THC in the *victim's* blood was evidence admissible to prove that the victim was grossly negligent and, if so, to relieve the defendant of responsibility for proximately causing the death. Reversing the trial court, the Court of Appeals concluded that this evidence was indeed admissible. But a separate section of this Court's opinion in *Feezel*, which I joined, clearly requires us to conclude that the trial court reasonably excluded the evidence.

In *Feezel* we held that a victim's intoxication may be relevant to whether the victim's gross negligence was a superseding cause of his

---

[1] Tom Greenwood, *Ruling clouds pot smoking, driving law*, Detroit News, July 29, 2010, available at <http://detnews.com/article/20100729/METRO/7290387/Ruling-clouds-pot-smoking--driving-law> (accessed August 30, 2010).

death. *Feezel*, 486 Mich at 201-202. We stressed, however, that such evidence is not relevant or admissible in all cases. *Id.* at 202. Gross negligence "means wantonness and disregard of the consequences which may ensue." *Id.* at 195 (citation omitted). "Wantonness," in turn, means " '[c]onduct indicating that the actor is aware of the risks but indifferent to the results' and usually 'suggests a greater degree of culpability than recklessness . . . .' " *Id.* at 196 (citation omitted). Mere consumption of an intoxicating substance "does not automatically amount to a superseding cause or de facto gross negligence." *Id.* at 202. Rather, the trial court must "make a threshold determination" in each case with regard to whether gross negligence is even in issue; that is, it must determine whether "the proofs are sufficient to create a question of fact for the jury" on the question of the victim's gross negligence. *Id.* In *Feezel*, this threshold was reached because the victim's observable behavior strongly suggested gross negligence; a witness reported that, when the victim was hit by the defendant's car, the victim was walking down the middle of an unlit road, with his back to oncoming traffic, on a dark rainy night. *Id.* at 188. Indeed, the witness, who drove past the victim just before the accident, reported that she did not see the victim until he was next to her car and that she would not have been able to avoid him if he had been in her lane of the road. *Id.* at 189-190. Accordingly, evidence that the victim was *also* extremely intoxicated by alcohol was relevant to the overall question whether he was so grossly negligent that a jury could conclude that the defendant driver did not proximately cause his death. *Id.* at 199.

I cannot conclude that such threshold evidence was present here. Although the victim may have been driving his motorcycle 9 or 10 miles over the posted speed limit, no direct evidence was admitted that his behavior was otherwise erratic or dangerous, let alone that it suggested wantonness beyond recklessness with disregard of the known risks. Further, although an expert testified that the 17 nanograms per milliliter of 11-carboxy-THC in the victim's blood suggested that his reaction time might have been slowed, the expert could not attest to how intoxicated the victim was; thus the evidence did not clearly establish, as in *Feezel*, that the victim was indisputably highly intoxicated. Accordingly, the trial court did not abuse its discretion in excluding the evidence here. And, in any event, exclusion was harmless because the defendant ran a stop sign at a high rate of speed. The victim could not have avoided this accident regardless of his level of intoxication. Thus, any intoxication could not be said to have been the superseding cause of the victim's death. Accordingly, I would grant the prosecution's application for leave to appeal on this issue.

YOUNG, J., joined the statement of CORRIGAN, J.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

Leave to Appeal Granted October 29, 2010:

PEOPLE v MUNGO, No. 141160; reported below: 288 Mich App 167. On order of the Court, the application for leave to appeal the April 13, 2010, judgment of the Court of Appeals is considered, and it is granted, limited

to the issue whether, assuming that *Arizona v Gant*, 556 US 332 (2009), is applied retroactively, the good-faith exception to the exclusionary rule allows admission of evidence that was seized pursuant to a warrantless search that was valid under cases interpreting *New York v Belton*, 453 US 454 (1981), as a bright-line rule. See *Herring v United States*, 555 US 135 (2009).

We further order the Washtenaw Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint the State Appellate Defender Office to represent the defendant in this Court.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

CAVANAGH, J. (*concurring*). I concur with the Court's order granting leave to appeal and would also request the parties to brief the authority for the arresting officer's request to the passenger for a driver's license and identification.

KELLY, C.J., joined the statement of CAVANAGH, J.

PEOPLE v SHORT, No. 141822; reported below: 289 Mich App 538. The application for leave to appeal the August 26, 2010, judgment of the Court of Appeals is considered, and it is granted, to consider whether the good-faith exception to the exclusionary rule applies to a warrantless vehicle search that was conducted under the authority of *New York v Belton*, 453 US 454 (1981), but that would be unconstitutional under *Arizona v Gant*, 556 US 332 (2009). We further order that the defendant may file, and the Saginaw Circuit Court may entertain, a motion for bond pending the appeal in this Court.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied October 29, 2010:

EDWARDS v CAPE TO CAIRO, No. 141339; Court of Appeals No. 280023.

MARKMAN, J. (*dissenting*). In the summer of 2001, plaintiff planned a trip to Africa. He prepaid defendant, a tour operator, for trip expenses, including airline tickets. After the 9/11 disaster, plaintiff cancelled the trip and sought a refund of his prepayments. The airlines that received these prepayments provided full refunds, but defendant sought to retain a portion of plaintiff's prepayments. The district court ruled that defendant must return all of the prepayments and pay attorney fees under the Michigan Consumer Protection Act, and the circuit court and the Court of Appeals affirmed.

Defendant's contract clearly states that "a minimum fee of $75 [is imposed] on all returned/cancelled tickets." Nothing in this contract states that this fee will only be charged where the airlines also charge such a fee. This is defendant's own fee, and plaintiff, by contracting with defendant to pay for tour expenses on his behalf, agreed to the cancelled ticket fee. Therefore, I would reverse the Court of Appeals in relevant part.

PEOPLE v MORGAN, No. 141915; Court of Appeals No. 299213.

Appeal Dismissed on Stipulation October 29, 2010:

PEOPLE v KNAPP, No. 140739; Court of Appeals No. 295816. Leave to appeal granted at 486 Mich 1070.

Summary Disposition November 3, 2010:

PEOPLE v MCMULLAN, No. 139209; Court of Appeals No. 281844. On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we hereby affirm the June 2, 2009, judgment of the Court of Appeals. Because a rational view of the evidence did not support an instruction of involuntary manslaughter when considering the particular facts of this case, the trial court did not err in denying defendant's request for the court to instruct the jury regarding involuntary manslaughter. However, we take this opportunity to clarify the opinion of the Court of Appeals.

As the Court of Appeals correctly noted, if a criminal defendant is charged with murder, the trial court should instruct the jury on involuntary manslaughter if the instruction is supported by a rational view of the evidence.[1] Reversal of a trial court's jury instruction decision is appropriate only where the offense was clearly supported by the evidence; an offense is clearly supported where there is substantial evidence to support it.[2] An appellate court must therefore review *all* of the evidence irrespective of who produced it to determine whether it provides a rational view to support an instruction on the lesser charge.

Here, the reasoning of the Court of Appeals relied too heavily on the prosecutor's evidence, accepting as fact evidence that defendant disputed. Specifically, the Court of Appeals assumed as fact two disputed issues: First, that defendant pushed the victim into the car and then shot the victim; defendant contends that he and the victim were engaged in a struggle at the car door when he discharged the weapon. Second, that defendant robbed the victim after the fact, which defendant denies. Even though the Court of Appeals majority partially erred to the extent that it accepted these contentions as proven fact, even absent these additional questions of fact, the lower courts properly concluded that a rational view of the evidence in this case does not support an instruction on involuntary manslaughter.

---

[1] *People v Mendoza*, 468 Mich 527, 541 (2003).

[2] *People v Silver*, 466 Mich 386, 388 (2002); *Mendoza*, 468 Mich at 545.

The facts inescapably show that defendant acted with malice because, at a *minimum*, he "inten[ded] to do an act in wanton and wilful disregard of the likelihood that the natural tendency of [his] behavior is to cause death or great bodily harm,"[3] and did *not* act with an intent merely to injure or with non-malicious gross negligence—the two recognized types of involuntary manslaughter.[4] Defendant admitted that, after a physical altercation with the victim, he left to obtain a loaded gun in order to threaten or scare the victim. Some evidence further showed that, when the defendant returned, the victim was shot in the chest when defendant and the victim again began to struggle at the victim's car. Defendant does not dispute that the gun was in his hand when it was cocked and then fired. The evidence indisputably established that the firearm had to be specifically cocked in order to fire. In particular, defendant conceded that the weapon is "designed to prevent it from firing unless you want it to fire." Based on this chain of events, and for the reasons otherwise stated by the Court of Appeals, we conclude that defendant's actions constitute a malicious series of intentional acts; they do *not* demonstrate a grossly negligent handling of a firearm that inadvertently caused death. Therefore, the trial court did not err in denying defendant's request for the jury to be instructed on involuntary manslaughter.

KELLY, C.J. (*dissenting*). I would reverse the Court of Appeals' decision. I believe that the dissent correctly concluded that defendant's conviction must be reversed because there was substantial evidence to support an instruction on involuntary manslaughter:

> A rational fact-finder could have believed defendant when he said that he did not intend to fire the weapon he was using merely to scare Smith, i.e., that he did not intend to do the act (firing the weapon) that caused Smith's death. That conclusion would be consistent with the long history defendant had with Smith, his attempts to help Smith following the shooting, his apparent grief at what had occurred and especially his corroborated accounts of being under the influence of drugs at the time the shooting occurred. As was the case with the defendant's "intoxication" in *People v Droste*, 160 Mich 66, 78-79; 125 NW 87 (1910), the fact-finder here might have concluded that, "at the moment" the gun discharged, defendant's drug use was sufficient "to rob his act of the necessary elements of murder."[1]

CAVANAGH, J., joined the statement of KELLY, C.J.

---

[3] *People v Goecke*, 457 Mich 442, 464 (1998).

[4] See *People v Holtschlag*, 471 Mich 1, 21-22 (2004).

[1] *People v McMullan*, 284 Mich App 149, 162-163 (2009) (BANDSTRA, J., dissenting). Although this Court has recognized that the Legislature has generally abolished the defense of voluntary intoxication, see *People v Nickens*, 470 Mich 622, 631 n 7 (2004), the actions occurring in this case occurred before MCL 768.37 went into effect. Accordingly, we need not consider any possible effect of MCL 768.37 on *Droste*.

PEOPLE v DARRYL LOFTON, No. 141206; Court of Appeals No. 297366. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Genesee Circuit Court, and we remand this case to that court and direct that court either to grant the defendant the opportunity to withdraw his plea or to resentence the defendant to two years on the charge of possession of a firearm during the commission of a felony, first offense, MCL 750.227b(1), for the reason that the defendant was misinformed at his plea hearing that he would serve a consecutive sentence of two years for his felony-firearm conviction, rather than the mandatory sentence of five years for felony-firearm, second offense. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions should be reviewed by this Court.

Leave to Appeal Granted November 3, 2010:

PEOPLE v LAMAR EVANS, No. 141381; Court of Appeals No. 290833. The parties shall address whether retrial is barred under the double jeopardy clauses of the state and federal constitutions where the trial court's grant of defendant's motion for a directed verdict was based on an error of law and did not determine any actual element of the charged offense.

The Criminal Defense Attorneys of Michigan, Prosecuting Attorneys Association of Michigan, and National Association of Criminal Defense Lawyers are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied November 3, 2010:

FLEMING v RICE, No. 139629; Court of Appeals No. 293816.

FORD v NATIONAL CHURCH RESIDENCES, INCORPORATED, No. 140978; Court of Appeals No. 288416.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

CHRISTIE v FICK, No. 141189; Court of Appeals No. 285924.

SAMUEL v PAROLE BOARD, No. 141257; Court of Appeals No. 296176.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

BAKER v TRANS-PORTE, INCORPORATED, No. 141333; Court of Appeals No. 289191.

WHITE v PROGRESSIVE MICHIGAN INSURANCE COMPANY, No. 141469; Court of Appeals No. 291144.

In re PEOPLE v LARRY KING, No. 141996; Court of Appeals No. 294682.

Summary Disposition November 5, 2010:

PEOPLE v RODNEY CARTER, No. 140522; Court of Appeals No. 293861. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to determine whether a violation of the mootness doctrine occurred in this case, see *People v Richmond*, 486 Mich 29 (2010), and, if so, to order proper relief, see *id*. and *People v Richmond*, 486 Mich 1041 (2010) (granting rehearing in *Richmond* in part).

MARKMAN, J. (*concurring*). I concur with this Court's order remanding to the trial court to determine whether a violation of the mootness doctrine occurred in this case, and, if so, to order the proper relief. In *People v Richmond*, 486 Mich 29, 32 (2010), we held that "the prosecution's voluntary dismissal of the charges rendered its appeal moot . . . ." Here, in proceedings that predated *Richmond*, but, needless to say, did *not* predate the mootness doctrine, see, e.g., *Anway v Grand Rapids R Co*, 211 Mich 592, 610 (1920), the prosecutor voluntarily dismissed the case after a district court suppression ruling, thereby rendering moot his appeal to the circuit court. As explained below, I see no reason to deviate from the general rule giving *Richmond* "full retroactive effect." *Pohutski v City of Allen Park*, 465 Mich 675, 696 (2002).

First, I am not persuaded by the dissent's assertion that the prosecutorial practice at issue here was "routine before *Richmond*." If so, it is hard to understand why *Richmond* would have been the first case ever to specifically address this practice, and, indeed, in at least my eleven years on this Court, the first case in which the practice was even presented to this Court. Were this a genuinely commonplace procedure, it does seem as if the obvious mootness question involved would have at least been engaged at some previous juncture in the appellate system. Moreover, the prosecutor in *Richmond*, representing the largest county in this state, himself has acknowledged that the "dismiss-then-appeal" procedure was employed on only the "rare occasion."

Second, our general principles of retroactivity support the application of *Richmond* in this case. Generally, "judicial decisions are given full retroactive effect." *Pohutski*, 465 Mich at 696. In determining whether a judicial decision should be applied retroactively, this Court considers: "(1) the purpose to be served by the new rule; (2) the extent of reliance on the old rule; and (3) the effect of retroactivity on the administration of justice." *Id.* The purpose of *Richmond* is to preserve and enforce the long-standing rule that courts do not reach moot questions. Whatever its supposed prevalence pre-*Richmond*, the "dismiss-then-appeal" procedure was never authorized by any judicial decision or court rule of this state, and it clearly violated the mootness doctrine, a well-understood doctrine of justiciability that considerably preceded *Richmond*. Thus, I neither believe that the "dismiss-then-appeal" procedure can fairly be deemed an "old rule," nor that taking the mootness doctrine seriously can be deemed a "new rule."

Further, I do not believe that applying *Richmond* retroactively could in any conceivable way be described as having an adverse effect on the

"administration of justice," especially since, as our order on rehearing clarified, *People v Richmond*, 486 Mich 1041 (2010), the prosecutor under the instant circumstances can recharge the defendant. The dissent's concerns in this regard, including its concern about any violation of the Michigan Rules of Professional Conduct, are fully addressed in that order, which was joined by the dissenting justices. To further ensure that there is no adverse impact upon the "administration of justice," this Court has determined to review this matter again at a future administrative conference. In light of these facts, in my view, *refusing* to apply *Richmond* retroactively would have a far worse impact on the "administration of justice," by (a) allowing the prosecutor to evade the mootness doctrine, (b) by allowing a conviction to stand even though the underlying case has already been dismissed, and (c) by undermining the authority and credibility of the precedents of this Court.

In sum, there is no reason to deviate from the general rule giving *Richmond* "full retroactive effect."[1] Because it appears that defendant is entitled to relief under *Richmond* and our principles of retroactivity, I fully concur with the Court's order.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the Court's order remanding to the trial court to determine whether a violation of the mootness doctrine occurred in light of *People v Richmond*, 486 Mich 29 (2010). The concurring justice supports giving *Richmond* full retroactive effect, yet the other justices in the majority have not clarified their view when perhaps they should. As a result, I ask whether this Court intends *Richmond* to apply with full retroactive effect or whether it is leaving this determination to the trial court. In any case, I believe that giving *Richmond* full retroactive effect is improper under our retroactivity standards and will cause substantial problems for the effective administration of justice. Accordingly, I support limiting the retroactive effect of *Richmond* to cases pending on appeal when *Richmond* was decided. See *People v Cornell*, 466 Mich 335, 367 (2002) (applying limited retroactivity to those cases pending on appeal in which the issue has been raised and

---

[1] The dissent argues that *Richmond* should be given limited retroactive effect, citing *People v Cornell*, 466 Mich 335, 367 (2002), in which we accorded limited retroactive effect to cases pending on appeal in which the *Cornell* issue had been preserved. However, as the dissent itself appears to recognize, *Cornell*'s standards are inapt because, "[a]s *Richmond* involves the application of the mootness doctrine, and the mootness doctrine is jurisdictional, prior preservation is unnecessary." The dissent nevertheless would limit *Richmond*'s retroactive effect to cases pending on appeal because *Richmond* "created a new rule." For the reasons earlier explained, I respectfully disagree that taking the mootness doctrine seriously, and applying it consistently, can in any way be deemed a "new rule."

preserved).[1]

After an unfavorable evidentiary ruling resulting in the suppression of evidence, the prosecutor, acting under procedures routine before *Richmond*, moved for dismissal. The record reflects that the district court assured the parties that the issues were preserved under the circumstances. Defense counsel explicitly indicated no objection on the record.[2] In treating any appeal after a voluntary dismissal by the prosecutor as moot, this Court has nullified a routine practice and placed prosecutors in an untenable position. See *Richmond*, 486 Mich at 42-48 (CORRIGAN, J., dissenting). The *Richmond* majority, in its characterization of this practice as a "procedural misstep," *Richmond*, 486 Mich at 40, evidenced disbelief that any such practice ever existed. But see Gillespie, Michigan Criminal Law and Procedure Practice Deskbook (2d ed, 2010), § 1:36, p 19, and Gillespie, Michigan Criminal Law and Procedure Practice Deskbook (2d ed, 1998), § 1:30, pp 16-17 (acknowledging the use of this practice as part of a stipulated dismissal necessitated by a dispositive evidentiary ruling). Nevertheless, by refusing to grant leave, the majority now forecloses any additional proofs about such a practice and eliminates the possibility of learning whether the rule adopted in *Richmond* is indeed a new rule.

Beyond the disturbing gamesmanship that *Richmond* permits for defendants and judges seeking to insulate a suppression decision from appellate review, if *Richmond* is given full retroactive effect, it likely will encourage numerous motions under MCR 6.500 for relief from judgment from previously convicted defendants seeking to challenge their convictions in circumstances where an appeal followed a prosecutor's dismissal. Such belated challenges, in which the relevant evidence may be missing or may have been destroyed, could result in the wrongful reversal of many otherwise valid convictions. By not taking action to accord *Richmond* limited retroactive effect, the majority effectively invites future problems.

---

[1] As *Richmond* involves the application of the mootness doctrine, and the mootness doctrine is jurisdictional, prior preservation is unnecessary. Nevertheless, because I believe that *Richmond* created a new rule, I support limiting its retroactive effect to cases pending on appeal when *Richmond* was decided.

[2] Specifically, the following exchange took place:

> *Prosecutor*: Your Honor, if the Court has suppressed the evidence we're unable to proceed in this matter and would be forced to dismiss the case.
>
> *Defense Counsel*: No objection.
>
> *The Court*: The matter will be dismissed at this time. And I know that issues relative to appeal are preserved under the circumstances.
>
> *Defense Counsel*: Thank you very much. [Preliminary examination transcript, July 30, 2007, p 18.]

I. UNDERLYING FACTS

Following the execution of a search warrant for the house where defendant was staying, defendant was charged with possession with intent to deliver over 1,000 grams of cocaine, possession of over 1,000 grams of cocaine, and felony-firearm. At the preliminary examination, the district court granted defendant's motion to suppress the evidence on the basis that the search warrant was deficient. The prosecution then moved to dismiss the case. In granting the motion to dismiss, the district court stated that "issues relative to appeal" were preserved under these circumstances and defense counsel did not object or otherwise disagree in any way with the district court's statement.

The prosecution subsequently obtained review of the district court's evidentiary decision in the circuit court. The circuit court peremptorily reversed the district court's decision and remanded the case to the district court. After rehearing the case, the district court bound defendant over to the circuit court for trial. Defendant pleaded guilty to possession with intent to deliver over 1,000 grams of cocaine and felony-firearm. He then filed an application for leave to appeal with the Court of Appeals, which denied leave. Defendant subsequently filed an application for leave to appeal in this Court, arguing in part that the prosecution waived its right to an appeal by voluntarily dismissing the case against him.

II. ANALYSIS

Because the relevant proceedings took place before this Court's opinion in *Richmond*, the pertinent question is whether *Richmond* should be given retroactive effect. The general rule is that judicial decisions are given full retroactive effect. *Pohutski v City of Allen Park*, 465 Mich 675, 695-696 (2002). Nevertheless, "a more flexible approach is warranted where injustice might result from full retroactivity." *Id.* at 696. Three factors to be weighed in determining whether a decision should have retroactive application are "(1) the purpose of the new rules; (2) the general reliance on the old rule[;] and (3) the effect of retroactive application of the new rule on the administration of justice." *People v Sexton*, 458 Mich 43, 60-61 (1998), citing *People v Hampton*, 384 Mich 669, 674 (1971). Other than the concurring justice, the majority does not answer the question of what type of retroactive effect is appropriate here. Regardless, I believe that the retroactivity factors weigh in favor of granting *Richmond* limited retroactive effect and against full retroactive application of *Richmond*.

First, the decision in *Richmond*, which applied the mootness doctrine in circumstances of a prosecutor's voluntary dismissal, created a new rule in applying this doctrine to a previously routine practice. The majority in *Richmond* noted that one option available to prosecutors who opt to voluntarily dismiss in this scenario is to simply reinstate charges. *Richmond*, 486 Mich at 36 n 3. However, this option is "problematic because it implies that the prosecution could have simply 'unmooted' the case at any time by reinstating the charges," when, in fact, "MRPC 3.1 provides that

'[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous.' " *Richmond*, 486 Mich at 45-46 (CORRIGAN, J., dissenting). Thus, the purpose of the new rule would not be served by full retroactive application because it may place prosecutors who relied on the old rule in the untenable situation of either violating the MRPCs by reinstating charges or permitting a valid conviction to be wiped out.

Second, as the facts of this case show, the bench and bar previously relied on the former practice of voluntary dismissals in the face of an unfavorable evidentiary ruling in criminal cases. See Gillespie (2d ed, 2010), § 1:36, p 19. Here, the district court, in granting the prosecution's motion to dismiss, explicitly noted that the issues were preserved for appeal. Although the rule that courts cannot decide moot questions is longstanding, applying it to the circumstances in *Richmond* established a new rule. Further, the prior practice had general statutory authorization under MCL 770.12(1), which explicitly gives the prosecutor an appeal as of right from a final order. *Richmond*, 486 Mich at 44 (CORRIGAN, J., dissenting). Thus, the significant reliance on the prior practice weighs against the full retroactive application of *Richmond*.

Third, if *Richmond* is given full retroactive effect it will negatively impact the efficient administration of justice. Vacating convictions retroactively in circumstances where *Richmond* applies will place prosecutors at a decided disadvantage. In addition to the already stated issue involving the MRPCs, because of the passage of time, prosecutors likely will face significant challenges gaining access to the necessary evidence and witnesses. Moreover, if *Richmond* is applied with full retroactive effect, it will place even more of a burden on the already stressed resources of prosecutor's offices and our judiciary, and of course, the wrongful release of convicted criminals endangers our communities. Accordingly, I respectfully dissent from the Court's order remanding to the trial court to determine whether a violation of the mootness doctrine occurred in light of *Richmond*.

YOUNG, J., joined the statement of CORRIGAN, J.

Leave to Appeal Denied November 5, 2010:

In re VALES, No. 141930; Court of Appeals No. 295669.

Reconsideration Denied November 5, 2010:

ALLEN v BELONGA, No. 141657; Court of Appeals No. 295753. Leave to appeal denied at 488 Mich 891 (2010).

Order Denying Motion Entered November 5, 2010:

PEOPLE v WACLAWSKI, No. 140629; Court of Appeals No. 287146. The defendant's motion to exceed the 50-page limit for his application for leave to appeal the December 29, 2009, judgment of the Court of Appeals is denied. The defendant failed to provide extraordinary and compelling reasons in support of the submission of an application with 81 pages of

substantive argument (including 37 pages of text numbered by Roman numerals and incorrectly labeled a "Statement of Jurisdiction and Relief Requested"). Applications for leave to appeal must conform to MCR 7.302(1) and 7.212(B). The only exceptions to the 50-page limit provided at MCR 7.212(B) are for tables, indexes, and appendices. The Statement of Jurisdiction and Relief Requested is for a brief description of jurisdiction and the relief sought only. Arguments regarding the substantive issues are appropriately placed in the argument section of the brief only. In addition, this Court will not be considering the brief dated June 18, 2009, which the defendant filed *in propria persona* in the Court of Appeals and which is an attachment to the defendant's application in this Court, because the defendant has cited no authority for applying Administrative Order 2004-6, Standard 4, to filings in this Court. The defendant shall have 14 days from the date of this order to submit an application that conforms to the court rules.

Leave to Appeal Denied November 9, 2010:

WILCOX V STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 138602; Court of Appeals No. 290515. Leave to appeal granted at 486 Mich 870.

[As amended by order of the Supreme Court entered December 1, 2010—REPORTER.]

The order of April 16, 2010, which granted leave to appeal is vacated and leave to appeal is denied.

CAVANAGH, J. (*dissenting*). I respectfully dissent from this Court's order vacating its prior order and denying leave to appeal. Because I believe that *Hoover v Mich Mut Ins Co*, 281 Mich App 617, 630-631 (2008), erroneously limited a no-fault insurer's liability for an allowable expense to only that portion of the expense that is solely attributable to the accidental bodily injury, I would vacate the Court of Appeals' order and remand to the trial court for further proceedings.

In 2004, Isaac Wilcox, then four years old, was left a quadriplegic as the result of an automobile accident. The Wilcox family, who originally lived in an apartment, subsequently purchased a handicap-accessible home to accommodate Isaac's needs. Plaintiffs filed a first-party no-fault action against defendant, their no-fault automobile insurance carrier at the time of the accident, seeking payment for Isaac's home accommodations. The trial court granted partial summary disposition in favor of defendant based on the Court of Appeals' interpretation in *Hoover* of *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521 (2005). This Court granted leave to appeal, asking the parties to address, in part, whether, or to what extent, defendant is required to pay personal protection insurance benefits under the no-fault act, MCL 500.3101 *et seq.*, for housing expenses and accommodations associated with Isaac's care. 486 Mich 870 (2010).

In *Griffith*, a majority of this Court held that the expense of ordinary food provided in a noninstitutional setting to a person injured in a motor vehicle accident was not recoverable under the no-fault act because the

plaintiff failed to establish that her husband's ordinary food expenses were causally connected to her husband's injury under MCL 500.3105(1), and that her husband's ordinary, everyday food expenses were for his care, recovery, or rehabilitation under MCL 500.3107(1)(a). *Griffith*, 472 Mich at 524, 530-532, 535-536. The majority reasoned that the plaintiff failed to meet its causal-connection requirement because the plaintiff did not claim that her husband's diet was "different from that of an uninjured person, that his food expenses [were] part of his treatment plan, or that the[] costs [were] related in any way to his injuries." *Id.* at 531. Similarly, the *Griffith* majority reasoned that the food costs were not related to the accident victim's "care, recovery, or rehabilitation," because there was no evidence that the plaintiff's husband required different food than he did before sustaining his injuries. *Id.* at 536.

In *Hoover*, the Court of Appeals examined to what extent housing expenses were recoverable under the no-fault act. In holding that *Griffith* "suggests" that an insurer is not obligated to pay those expenses that ordinarily would have been incurred in the course of a life unmarred by an accident, the *Hoover* panel found "crucially important" a rhetorical question regarding housing needs posed in one passage from *Griffith*, which asked whether a defendant would be obligated to pay an injured person's housing needs once the person is released from institutional care if the housing needs were not affected by that person's injuries. *Hoover*, 281 Mich App at 627; see, also, *id.* at 630-631 (stating that *Griffith* suggests that a court must allocate the portion of a bill attributable to the injured person's use that is only occurring because of his injuries).

Although I continue to believe that *Griffith* was wrongly decided, see *Griffith*, 472 Mich at 542-554 (KELLY, J., dissenting), even under the *Griffith* majority's erroneous interpretation of the relevant statutory provisions, I believe that the *Hoover* panel erred by hinging its analysis on the majority's rhetorical question rather than considering the majority opinion as a whole. Notably, the *Griffith* majority did not hold that if its requirements were met, only the marginal increase in the cost of an injured person's food would be an allowable expense. In fact, the majority opinion strongly implies otherwise. See *id*. at 535-538 (suggesting that if the plaintiff's husband was required to eat "special diet" food, no-fault benefits would have covered those food costs without any reductions for the plaintiff's pre-injury food needs);[1] see, also, *id.* at 535 n 12 (stating that the costs of "special shoes" would be an "allowable expense" under MCL 500.3107[1][a] and not suggesting that only the marginal costs of modifying regular shoes would be recoverable).

Further, *Griffith* did not purport to overrule caselaw from the Court of Appeals and this Court that seemingly rejected the allocation-of-costs approach adopted in *Hoover*. See, e.g., *Davis v Citizens Ins Co of America*, 195 Mich App 323, 326-328 (1992) (holding that the full purchase price of a modified van was an allowable expense); *Sharp v Preferred Risk Mut Ins Co*, 142 Mich App 499, 510-512 (1985) (holding that as long as larger and better equipped housing was required for an injured person than

[1] Indeed, even the *Hoover* panel recognized this as such. See *Hoover*, 281 Mich App at 627 n 5, 634-635.

would be required if he were not injured, the full cost is an allowable expense); cf. *Miller v State Farm Mut Auto Ins Co*, 410 Mich 538, 567-570 (1981) (rejecting the idea that survivors' loss benefits under MCL 500.3108 should be reduced by a decedent's purely personal expenses because, in addition to the statute's legislative history, reducing survivors' benefits by a decedent's "consumption factor" would be difficult to calculate and would defeat the no-fault act's goals of minimizing factual disputes and expeditious reparation of injuries).

Accordingly, I would hold that the *Hoover* panel erred by interpreting *Griffith* to require an allocation-of-costs analysis. Further, I would conclude that, even under the majority position in *Griffith*, if a plaintiff establishes that the injured person's housing needs are causally connected to his injuries under the reasoning employed by the *Griffith* majority, see *Griffith*, 472 Mich at 531-532, the trier of fact should generally be permitted to determine, under MCL 500.5107(1)(a), to what extent a handicap accessible family home is a reasonably necessary accommodation for the particular injured person's care, recovery, or rehabilitation and whether the incurred expense was reasonable. See *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 55 (1990) (stating that whether expenses are reasonable and reasonably necessary is generally one of fact for the jury). Because I believe that *Hoover* was wrongly decided, I respectfully dissent from this Court's order vacating its prior order and denying leave to appeal.

KELLY, C.J., and HATHAWAY, J., joined the statement of CAVANAGH, J.

Leave to Appeal Denied November 12, 2010:

In re SMYTH, No. 141816; Court of Appeals No. 295072.

CORRIGAN, J. (*dissenting*). I would grant the respondent mother's application for leave to appeal in this significant child protection case. The trial court concluded, on the basis of close facts, that termination of respondent's rights to her three young children[1] was in the children's best interests under MCL 712A.19b(5). This statute was amended in 2008[2] to require an affirmative finding by the trial court "that termina-

---

[1] Respondent's infant twins were removed from her care by the Department of Human Services (DHS) after respondent brought one infant to the hospital with a broken leg; although she promptly sought medical attention and had not been present when the injury was inflicted, the trial court concluded in part that she had failed to protect the child from his abusive father. Based in part on this incident, the court also granted the DHS's petition to remove respondent's new baby, who was born some months later to a different father. After the children were removed respondent was required to participate in a parent-agency agreement administered by the DHS in order to regain custody of the children. The record reflects that she participated with some success, but also had lapses in participation.

[2] 2008 PA 199.

tion of parental rights is in the child's best interests" before the court may terminate parental rights under the statutory subsections at issue here. But the Legislature did not specify what quantum of proof—e.g., clear and convincing evidence or a preponderance of the evidence—is applicable to this crucial finding. Nor did the trial court here specify what quantum of proof it applied to the evidence when it reached its decision. Significantly, the court itself acknowledged that this was a difficult "disconcerting case."[3] Further, the court relied in part on the equivocal testimony of a psychologist who opined that he was "leaning towards" recommending termination but was "not going to throw in the towel and say it's a hopeless situation."[4] Accordingly, the applicable quantum of proof was critical to the outcome. If this Court were to conclude that a

---

[3] Indeed, the court began its ruling by listing respondent's good qualities and accomplishments. The court found the fact that respondent had established a home for her children by the time of the trial "very impressive." It found her efforts to pursue education "in pharmacy" reasonable and laudable. It observed that she "doggedly pursued" creating a good life for herself and her children, and had attended "a great number of sessions" required by the DHS parent-agency agreement although she lacked a vehicle and was undergoing a difficult pregnancy. "Over all this period of time," said the court, "she's demonstrated a lot of strong qualities that [it] would expect will benefit her far into the future." Nonetheless, the court concluded that her successes were "too little, too late" to afford permanency for the children.

[4] The psychologist, who evaluated respondent once prior to the best interests hearing, testified that "perhaps it would be better to terminate parental rights" because respondent made "heavy use of denial," was unwilling "to acknowledge any deficiencies or problems or shortcomings as a parent," and was "very likely to continue to be inconsistent in her ability to comply with the Court's expectations." But he admitted that he had been unaware of some facts underlying the case. For example, although he partially based his opinion on his understanding that she twice tested positive for marijuana after her children had been removed, he was unaware that she had successfully passed numerous other drug screens. He was also unaware of other details such as that she was experiencing a high-risk pregnancy and was without a vehicle during the time she was required to comply with the DHS's programming. Although he stated that such details would not affect his recommendation, his recommendations remained equivocal. He stated: "My recommendation was that because I don't know all the facts that consideration be given to termination of parental rights." The court responded: "What does that mean? Is that a recommendation or a suggestion?" The psychologist answered: "That's where I'm leaning towards, your Honor. That is what I feel based on the information that I have what might be the best for the children." He added that he was "not going to throw in the towel and say

prosecutor must prove that termination is in a child's best interests by clear and convincing evidence—just as the prosecutor must prove the initial grounds for termination by clear and convincing evidence, MCL 712A.19b(3)—a remand would be necessary for the trial court to consider the best interests evidence under this standard and to rearticulate, and potentially reverse, its ruling.

CAVANAGH, J., joined the statement of CORRIGAN, J.

In re O'BERRY, No. 141818; Court of Appeals No. 295077.

CORRIGAN, J. (*dissenting*). I would grant the respondent mother's application for leave to appeal in this significant child protection case. The trial court concluded, on the basis of close facts, that termination of respondent's rights to her three young children[1] was in the children's best interests under MCL 712A.19b(5). This statute was amended in 2008[2] to require an affirmative finding by the trial court "that termination of parental rights is in the child's best interests" before the court may terminate parental rights under the statutory subsections at issue here. But the Legislature did not specify what quantum of proof—e.g., clear and convincing evidence or a preponderance of the evidence—is applicable to this crucial finding. Nor did the trial court here specify what quantum of proof it applied to the evidence when it reached its decision. Significantly, the court itself acknowledged that this was a difficult "disconcerting case."[3] Further, the court relied in part on the equivocal

---

it's a hopeless situation," but also concluded that the probability of respondent being noncompliant again was "high."

[1] Respondent's infant twins were removed from her care by the Department of Human Services (DHS) after respondent brought one infant to the hospital with a broken leg; although she promptly sought medical attention and had not been present when the injury was inflicted, the trial court concluded in part that she had failed to protect the child from his abusive father. Based in part on this incident, the court also granted the DHS's petition to remove respondent's new baby, who was born some months later to a different father. After the children were removed respondent was required to participate in a parent-agency agreement administered by the DHS in order to regain custody of the children. The record reflects that she participated with some success, but also had lapses in participation.

[2] 2008 PA 199.

[3] Indeed, the court began its ruling by listing respondent's good qualities and accomplishments. The court found the fact that respondent had established a home for her children by the time of the trial "very impressive." It found her efforts to pursue education "in pharmacy" reasonable and laudable. It observed that she "doggedly pursued" creating a good life for herself and her children, and had attended "a great number of sessions" required by the DHS parent-agency agreement although she lacked a vehicle and was undergoing a difficult pregnancy.

testimony of a psychologist who opined that he was "leaning towards" recommending termination but was "not going to throw in the towel and say it's a hopeless situation."[4] Accordingly, the applicable quantum of proof was critical to the outcome. If this Court were to conclude that a prosecutor must prove that termination is in a child's best interests by clear and convincing evidence—just as the prosecutor must prove the initial grounds for termination by clear and convincing evidence, MCL 712A.19b(3)—a remand would be necessary for the trial court to consider the best interests evidence under this standard and to rearticulate, and potentially reverse, its ruling.

CAVANAGH, J., joined the statement of CORRIGAN, J.

CAPELLI v CAPELLI, No. 141998; Court of Appeals No. 300168.

Summary Disposition November 19, 2010:

In re CW, No. 140841; Court of Appeals No. 292866. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of

---

"Over all this period of time," said the court, "she's demonstrated a lot of strong qualities that [it] would expect will benefit her far into the future." Nonetheless, the court concluded that her successes were "too little, too late" to afford permanency for the children.

[4] The psychologist, who evaluated respondent once prior to the best interests hearing, testified that "perhaps it would be better to terminate parental rights" because respondent made "heavy use of denial," was unwilling "to acknowledge any deficiencies or problems or shortcomings as a parent," and was "very likely to continue to be inconsistent in her ability to comply with the Court's expectations." But he admitted that he had been unaware of some facts underlying the case. For example, although he partially based his opinion on his understanding that she twice tested positive for marijuana after her children had been removed, he was unaware that she had successfully passed numerous other drug screens. He was also unaware of other details such as that she was experiencing a high-risk pregnancy and was without a vehicle during the time she was required to comply with the DHS's programming. Although he stated that such details would not affect his recommendation, his recommendations remained equivocal. He stated: "My recommendation was that because I don't know all the facts that consideration be given to termination of parental rights." The court responded: "What does that mean? Is that a recommendation or a suggestion?" The psychologist answered: "That's where I'm leaning towards, your Honor. That is what I feel based on the information that I have what might be the best for the children." He added that he was "not going to throw in the towel and say it's a hopeless situation," but also concluded that the probability of respondent being noncompliant again was "high."

Appeals dissenting opinion, we vacate the June 8, 2009, order of the Genesee Circuit Court, Family Division, and we remand this case to the circuit court for further proceedings. On remand, the circuit court shall allow the petitioners to present relevant evidence in support of their claim that the Michigan Children's Institute Superintendent's decision to withhold consent to adopt the minor children was arbitrary and capricious. MCL 710.45(2). After admitting and considering this evidence, the circuit court shall determine whether the petitioners have established by clear and convincing evidence that the Superintendent's decision was arbitrary and capricious. MCL 710.45(7). The circuit court shall expedite consideration of this matter, and shall issue an opinion to be filed with the clerk of this Court within 56 days of the date of this order. We retain jurisdiction.

CORRIGAN, J. (*concurring*). The petitioners in this adoption case, Valeriu and Karen Martin, voluntarily raised the three subject children—two of them from birth—until the children were removed from the Martins' home for reasons that a Department of Human Services (DHS) hearing officer later found baseless. The Michigan Children's Institute (MCI) Superintendent subsequently granted consent for a foster family, the Rabers, to adopt the children in part because the children had bonded with the Rabers after they were wrongfully removed from the Martins' home. In making this decision, the Superintendent merely exchanged an email with the children's lawyer-guardian ad litem (LGAL), who had requested a meeting with him to explain why she believed the children's best interests would be served by adoption by the Martins. Moreover, at least one of the superintendent's reasons for denying the Martins' request for consent to adopt was inaccurate; and some reasons weighing against his decision in favor of the Rabers' request were not investigated. As Judge SHAPIRO correctly recognized in his opinion dissenting from the Court of Appeals majority decision, in reviewing the superintendent's decision under MCL 710.45, the trial court incorrectly concluded that it was essentially powerless to consider the accuracy of information relied on by the superintendent or the nature of facts he failed to consider. On the basis of this erroneous conclusion, the trial court improperly declined to hear the Martins' proffered testimony in their favor from social workers and others familiar with the children.

FACTS AND PROCEEDINGS

The Martins raised the three subject brothers, CW (DOB 11/16/01), BW (DOB 3/2/2004) and DW (DOB 11/11/2005), along with their older sister, AW (DOB 4/9/93), because the children's mother, a drug and alcohol user, could not care for them. After the parental rights of the children's parents were terminated, the Martins began the process to adopt them.

But on April 23, 2007, before completion of the adoption, Child Protective Services (CPS) received a complaint alleging that Karen Worden, a developmentally disabled adult who lived with the Martins, had been outside the home "screaming" at and spanking DW, who apparently was trying to crawl out of his stroller near the street. At a May

24, 2007, meeting in which the Martins participated, DHS staff stated that the complaint would not be substantiated. The Martins were thus authorized to complete the adoption process. Nonetheless, shortly after, at a June 13, 2007, internal meeting, Ingham County DHS Director Susan Hall ordered all four children removed from the Martins' home. The children were placed in foster care with the Rabers. AW, who is now 17 and whose adoption is not at issue, consistently ran away from the Rabers and back to the Martins. She was placed back with the Martins.

Worden moved out of petitioners' house on June 21, 2007. The Martins appealed the removal of the children to the Foster Care Review Board (FCRB), but the FCRB dismissed the appeal because the DHS had placed the Martins on the Child Abuse and Neglect Central Registry as a result of the incident involving Worden. The registry listing precluded the children from being returned to the Martins and also rendered them ineligible to adopt.

The Martins immediately requested a DHS hearing to contest the registry listing. Their repeated requests apparently went unheeded for at least a month. Finally, DHS administrative proceedings commenced before a hearing officer, culminating in a final hearing that took place on September 29, 2008, over one year after the children had been removed from the Martins' home. In a November 5, 2008 decision, the hearing officer expunged the Martins' names from the registry after ruling that the DHS had not proved that they or Worden had abused or neglected any of the children. The hearing officer observed that the sole basis for the registry listing was the Martins' alleged failure to protect the children from Worden, yet DW had not been injured during the April 2007 incident and, although there were prior CPS complaints against Worden, none had ever been substantiated. The hearing officer further stressed that, after the CPS complaint was brought to the Martins' attention, they agreed to refrain from permitting Worden to supervise the children and "no evidence was presented to show that the Martins had failed to follow through on the agreement." The hearing officer added that "everyone who was involved with the family noted the bonding that the Martins had with the children, and none of the mandated reporters [including doctors and therapists] expressed any concern about the care the children were receiving."

In light of the hearing officer's favorable ruling, the children's LGAL requested placement of the boys back with petitioners for purposes of adoption. But the boys remained with the Rabers, and the MCI Superintendent had already granted consent for the Rabers to adopt them. The superintendent then rescinded his decision in favor of the Rabers in order to allow both families to seek adoption. But, after an investigation of the Martins, he denied the Martins' request and again granted the Rabers' request.

In a 2½-page decision, the superintendent concluded that, although removal of the children from the Martins might have been in error, it was not in the children's best interests to be removed from the Rabers' home where they had lived and formed stable connections since June 2007. He cited factors including that the Rabers were able to meet the children's special needs whereas the Martins' "ability to meet the developmental

needs of these children was inadequate." He also opined that the Martins "failed to recognize the risk to the children of being cared for by Ms. Worden" and had regularly allowed Worden to watch the children—while being untruthful to DHS workers about it—although the DHS had instructed them not to do so. Further, the Martins failed to fully cooperate with the DHS; they were often hostile and failed to provide information necessary to move forward with the adoption. Finally, because the children had been placed with the Martins as fictive kin, the Martins were never licensed as a foster home and further delay for licensing was contrary to the children's need for permanency.

Petitioners moved for court review of the superintendent's decision under MCL 710.45, arguing that his decision was based on inaccurate and incomplete information and alleging that he had blindly deferred to the recommendations of local DHS officials. The superintendent testified that he had reviewed records and had spoken to certain DHS staff, including the workers assigned to oversee the children while placed with the Rabers, and the supervisor who had opposed expungement of the Martins' names from the Registry before the hearing officer. He also spoke to the children's former LGAL. He had found it unnecessary to speak with the Martins or with AW, with whom the boys were bonded, in making his decision. He also had not spoken to doctors or therapists—nor had he reviewed medical records—from the time when the Martins cared for the children. It appears that, although he did not speak to the current LGAL or permit her to attend DHS meetings, he received her recommendation in favor of petitioners.

The Martins made an offer of proof outlining additional testimony that the superintendent ignored significant evidence in their favor as well as evidence refuting his positive findings about the Rabers. For example, AW would testify that the Rabers both worked full time and "provided minimal care to the younger children," that her brothers appeared to deteriorate physically and mentally after placement with the Rabers, and that the Rabers were antagonistic toward AW having contact with her brothers. The Martins also offered the testimony of a DHS foster care worker who would address "the ongoing educational, behavioral, and sociological issues experienced by the [children] since being removed from the Martin home." A DHS caseworker assigned to the children when they lived with the Martins would further testify that the superintendent's facts and conclusions concerning the Martins' care of the children were "flat-out wrong, incorrect, and baseless." She would opine that the Martins "did a fine job of meeting the special needs of the . . . children and that Karen Martin had dedicated herself to doing so on a nearly fulltime basis." Health care providers would testify that petitioners provided "exemplary care" and, when the children were placed with them, the children suffered from "none of the educational or psychological conditions which require strong psychotropic medications currently being provided . . . while in the Rabers' care." An MCI consultant would testify that reports prepared for the superintendent included "patently false and incorrect" information concerning CPS complaints and care of the children by petitioners. Finally, the Martins offered other

testimony negatively characterizing the Rabers' qualifications as caregivers for the three special needs children.

The judge refused to admit the proffered evidence and dismissed the Martins' petition for review. Although the judge was sympathetic to the Martins' plight and stated that the events of the case "made [her] sick," she opined that the proffered evidence was irrelevant because the court could not consider whether the superintendent's decision was right or wrong, or even whether it was based on "bad" information given to him. Rather, the court could only consider whether the decision seemed "reasoned."

The Martins appealed in the Court of Appeals. A majority affirmed over Judge SHAPIRO's dissent. The majority expressed some concern about the superintendent's "limited" investigation of the Martins' abilities to meet the children's developmental needs. *In re CW*, unpublished opinion per curiam of the Court of Appeals, issued February 16, 2010 (Docket No. 292866), p 3. But the majority opined that the Martins' offer of proof with regard to this issue "was insufficient for the trial court to have concluded that there were no good reasons for [the superintendent] to have withheld consent." *Id.* at 4.

Judge SHAPIRO disagreed, stressing that the court's duty required it to evaluate whether the superintendent's articulated reasons were made with consideration for the children's individual circumstances and thus whether his reasons were valid in light of the facts of the case. Judge SHAPIRO further concluded that the excluded evidence *could* have changed the outcome. In particular, evidence of the Martins' ability to meet the children's needs and of the children's alleged decline since placement with the Rabers was directly relevant to whether the superintendent's decision was well reasoned. The Martins' evidence might also refute the superintendent's assumption that petitioners continued (or would continue) to permit Worden to have contact with the children. The superintendent's focus on the children's current bond with the Rabers, moreover, was at odds with their current LGAL's conclusion that adoption by the Martins was in their best interests and with the fact that adoption by the Rabers meant splitting them permanently from AW.

Finally, Judge SHAPIRO opined that the superintendent "glosse[d] over" the "crux of the issue in this case," which was the erroneous registry listing and the Martins' successful efforts to have their names expunged. He asserted that the Martins, "having done nothing wrong and doing everything within their power to fix an error that was not theirs, find themselves not only without custody of the three children they have raised since the children were two years old or younger, but also without recourse." Accordingly, "[a]t the very least," they should have been permitted to present all their evidence. *Id.* at 4 (SHAPIRO, J., dissenting).

DISCUSSION

The MCI Superintendent "has the power to make decisions on behalf of" children who are wards of the state, MCL 400.203(2), including the

authority to consent to adoption. MCL 400.209(1). If the superintendent denies a petitioner's request for consent to adopt, the petitioner may file a motion with the court alleging that the superintendent's decision was arbitrary and capricious. MCL 710.45(2). The court must determine whether the petitioner has shown by clear and convincing evidence that the decision was arbitrary and capricious. MCL 710.45(7) and (8); *In re Cotton*, 208 Mich App 180, 185-187 (1994). This Court has stated on the basis of United States Supreme Court jurisprudence:

> "Arbitrary is: ' "[W]ithout adequate determining principle * * * Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, * * * decisive but unreasoned." '
>
> "Capricious is: ' "[A]pt to change suddenly; freakish; whimsical; humorsome.' " [*Goolsby v Detroit*, 419 Mich 651, 678 (1984) (citations omitted).]

"Capricious" also means being "subject to, led by, or indicative of caprice or whim[.]" *Random House Webster's College Dictionary* (2001). "Caprice," in turn, may refer to "a tendency to change one's mind without apparent or adequate motive[.]" *Id*. This Court has further acknowledged that bad faith is not a necessary element of arbitrary conduct. Rather, under some circumstances, arbitrariness may be evident in proof that an act was undertaken " 'in a perfunctory fashion' " or on the basis of ignorance of facts directly bearing on the matter. *Goolsby*, 419 Mich at 669, quoting *Milstead v Int'l Brotherhood of Teamsters, Local Union No 957*, 580 F2d 232, 235 (CA 6, 1978).

The lower courts relied on the Court of Appeals opinion in *In re Cotton* to conclude, in the words of the trial judge, that a petitioner's burden under MCL 750.45 is "almost impossible." The Court of Appeals opined that the evidence proffered by the Martins was essentially irrelevant because it "was insufficient for the trial court to have concluded that there were no good reasons for [the Superintendent] to have withheld consent." *In re CW*, unpub op at 4. To support this conclusion, the Court of Appeals cited *In re Cotton*, 208 Mich App at 185, for the proposition that "it is the absence of any good reason to withhold consent, not the presence of good reasons to grant it, that indicates that the representative was acting in an arbitrary and capricious manner."

But the tribunals misinterpreted *In re Cotton* in this regard, thus effectively rendering their review under MCL 750.45 meaningless. The oft-cited portion of *In re Cotton* was primarily aimed at refuting the narrow question posed in that case: whether the Legislature intended for a reviewing court to decide adoption issues de novo "and substitute its judgment for that of the representative of the agency that must consent to the adoption." *Id.* at 184. *In re Cotton* did not establish, as the lower courts appear to conclude, that the superintendent's decision must be affirmed as long as it appears facially reasoned, without regard to the accuracy of the facts or the thoroughness of the investigation, as long as a single "good" reason supports the decision. To the contrary, as *In re*

Cotton explicitly suggested, a reviewing court may address whether the bases for his decision are "without factual support." *Id.* at 186.

The Court of Appeals further illustrated this concept in *In re Keast*, 278 Mich App 415, 422, 433, (2008), in which the petitioner argued that the superintendent's decision denying consent was based on "selected and edited reports" and the bias of a DHS worker. The trial court in *Keast* took testimony and carefully reviewed the factual bases for the superintendent's reasoning in resolving this claim and, in turn, the appellate panel reviewed the record in detail to conclude that no facts supported the allegation that DHS staff were biased. *Id.* at 433, 434. The panel also reviewed the record in detail before concluding that the superintendent's reasons were supported by facts in the record. *Id.* at 430. The panel ultimately ruled that the Superintendent's decision "was supported by the documentation provided to him as well as by his independent investigation and it was not arbitrary or capricious." *Id.* at 435.

Many other Court of Appeals panels have similarly concluded that the accuracy and completeness of facts underlying a superintendent's decision are necessary for court review under MCL 750.145. Most notable in this regard is *In re CLH*, unpublished opinion per curiam of the Court of Appeals, issued June 3, 2003 (Docket No. 244877), quoted by Judge SHAPIRO. The panel in *In re CLH* observed that reviewing a decision for whether it was arbitrary and capricious requires considering whether the articulated reason for denying consent "was made without consideration of the child's individual circumstances" and this "entails examination of whether [the] reason was invalid in light of the evidence." *Id.* at 3. "Otherwise," said the panel, "review of an agency representative's decision under MCL 710.45(5) would amount to nothing more than a rubber stamp of whatever reason the representative articulated, and the statutory review procedure would be illusory." *Id*. Compare *In re Greenwood*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2008 (Docket No. 277366), p 4 (stating that "whether the superintendent had before him a complete evaluation of the circumstances of the children, in advance of his adoption decision," is relevant to whether his reasons for denying consent "were valid in light of the specific circumstances of the children" and thus to whether his decision was arbitrary and capricious), with *In re Eckles*, unpublished opinion per curiam of the Court of Appeals, issued September 24, 2004 (Docket No. 252893), p 7 (stating that trial court properly rejected the superintendent's decision denying consent where his reason was factually unfounded).

The lower courts here wrongly concluded that the accuracy and completeness of the facts underlying the superintendent's decision were irrelevant to review of his decision. And the Martins' proffered evidence directly refuted the facts underlying the superintendent's reasons for denying consent and supported an argument that his investigation of the Martins was perfunctory.[1] Most notably, even the existing record clearly confirms that the superintendent had no factual basis for his conclusion

---

[1] On this point, I acknowledge that the superintendent bears a heavy investigative burden; he testified that he is required to grant or deny

that the Martins' "ability to meet the developmental needs of these children was inadequate." Rather, the record showed that the Martins had successfully cared for the children—each of whom had special needs and required weekly doctor and therapist appointments—when the children lived with them. The Martins' offer of proof also suggests that the children had no need of psychotropic medications while under the Martins' care. Further, the superintendent's failure to speak to doctors, teachers, the Martins or AW about the boys' alleged deterioration since their placement with the Rabers undermines his conclusion that the children's interests were comparatively better served by placement with the Rabers. It is also notable that the superintendent appears not to have meaningfully consulted with the children's current LGAL, who strongly supported placement with the Martins and offered her input to the superintendent. MCL 400.204(2) expressly provides that the LGAL and the superintendent "shall consult with each other" if the LGAL "has an objection or concern" with regard to the child's placement or permanency planning.

Because the lower courts misunderstood their review function—and because the Martins' offer of proof was directly relevant to whether the superintendent's decision was arbitrary and capricious as a result of a perfunctory investigation or based on factually unsupported reasons—I concur in the order remanding for the trial court to revisit its decision after considering the Martins' proffered evidence.

KELLY, C.J., joined the statement of CORRIGAN, J.

YOUNG, J. (*dissenting*). I dissent from the Court's order reversing the decisions of the lower courts. The Michigan Children's Institute Superintendent's decision to withhold consent to adopt was not arbitrary and capricious. Therefore, there is no need to remand for an evidentiary hearing. The superintendent provided valid justifications for withholding consent; specifically, that the children's best interests were served by keeping them in the home of the family with whom they developed close psychological bonds and a stable familial relationship. The relevant statute, MCL 710.45, requires nothing more. I would deny leave to appeal.

The children in this case lived with the Martin family from a very young age until June 2007. At that time, the Ingham County Department of Human Services removed the children from the Martins' care and placed them with the Raber family. Although it was later determined that the basis for removing the children was incorrect, the children remained with the Rabers. In early 2009, the superintendent withheld consent from the Martins to adopt the children and instead granted consent to the Rabers, with whom the children continue to reside. Among

---

requests for consent to adopt in 250 to 275 contested cases every year. When making his decisions, the superintendent certainly may rely in part on DHS reports that he reasonably believes to be accurate. But mere uncritical reliance on DHS reports does not fulfill his statutory duty to make these decisions as the guardian of wards of the state. MCL 400.203(1).

other reasons given, the superintendent withheld consent from the Martins because the Martins were not licensed to operate a foster home nor were they approved as an adoptive home, the children had established close psychological bonds to the Rabers, and the children had formed a stable familial relationship with the Rabers.

Parties who wish to challenge the superintendent's decision to withhold consent to adopt may do so by bringing a motion before the trial court. A petitioner bringing such a motion bears a heavy burden. The motion must include the specific reasons why the superintendent's decision was arbitrary and capricious,[1] and, unless the evidence is clear and convincing, the court "*shall* deny" the challenger's motion.[2]

A decision is arbitrary if it is made "[w]ithout adequate determining principle . . . [.] Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned."[3] Capricious decisions are "[a]pt to change suddenly; freakish; whimsical; humorsome."[4] Reviewing courts do not determine whether the Superintendent's decision to withhold consent was correct.[5] Rather, the inquiry is limited to whether the Superintendent acted arbitrarily and capriciously in deciding to withhold consent.[6] As a result, judicial review of the superintendent's decision is highly deferential. Not only must a challenging party demonstrate that the decision was arbitrary and capricious, they must do so by clear and convincing evidence.[7]

The evidence adduced at the trial court demonstrates that the superintendent's decision was supported by valid justifications that considered the individual circumstances of the children. At the time the superintendent made his decision, the children, all under age 10, had been living with the Rabers for nearly 2 years, and had "formed a stable relationship," and established "close psychological connections" with the Rabers. The superintendent also noted that the Martins did not have a license to operate a foster home and the licensing process would delay permanency for the children. The superintendent's decision to withhold consent to adopt was premised upon the children's psychological well-being and stability. Rather than remove these young children from their home and family a second time in as many years, the superintendent reasonably determined that it was in the children's best interest to remain with their current family. That justification is even more compelling today, as these young children have now lived in the same stable, loving home for the past three and a half years.

---

[1] MCL 710.45(2).

[2] MCL 710.45(7) (emphasis added).

[3] *Goolsby v Detroit*, 419 Mich 651, 678 (1984) (quotation marks and citations omitted).

[4] *Id*. (quotation marks and citations omitted).

[5] *In re Cotton*, 208 Mich App 180, 184 (1994).

[6] *Id*.

[7] MCL 710.45(7).

As the Court of Appeals observed in *In re Cotton*, "it is the absence of any good reason to withhold consent, not the presence of good reasons to grant it, that indicates that the [superintendent] was acting in an arbitrary and capricious manner."[8] Far from an unreasoned decision reached without reference to circumstance or taken in a whimsical manner, the superintendent considered the emotional and psychological well-being of the children in withholding consent from the Martins. Granting consent to the Rabers to adopt the children prevented the psychological trauma of changing families once again.

Because the superintendent's decision was not arbitrary and capricious, remanding for an evidentiary hearing is unnecessary and only delays permanency for children who have spent their *entire lives* in foster care. That the children have lived in a loving, stable home with a family that attends to their needs and with whom the children have established close emotional bonds will remain unchanged after an evidentiary hearing. The ongoing need for stability will likewise remain the same for these young children. The lower courts properly held that the Martins failed to satisfy their evidentiary burden. Because the majority gives short shrift to the scope of review, and delays permanency for these young children, I dissent.

MARKMAN, J. (*dissenting*). Although I have no doubt that the Martins could provide a loving and stable home for these children, and am cognizant that the original basis for the Department of Human Services removing these children from the Martins' care was in error, I nonetheless agree with the analysis set forth by Justice YOUNG, and therefore join his dissenting statement.

Leave to Appeal Denied November 19, 2010:

RUZAK v USAA INSURANCE AGENCY, INCORPORATED, No. 141510; Court of Appeals No. 288053.

YOUNG, J., would grant leave to appeal.

MARKMAN, J. (*dissenting*). I respectfully dissent from the Court's order denying leave to appeal. This Court stated long ago in clear and certain terms that a party to a contract has the "duty to examine the contract, to know what he signed, and complainants cannot be made to suffer for this neglect upon his part." *Liska v Lodge*, 112 Mich 635, 637-638 (1897). Like all parties to a contract, insurance policy holders are obligated to read their policies. *House v Billman*, 340 Mich 621, 627 (1954). Even if the insureds have not read the policy, they are charged with knowledge of its terms. *Komraus Plumbing & Heating, Inc v Cadillac Sands Motel, Inc*, 387 Mich 285, 290 (1972). The Court of Appeals has recognized an exception to this fundamental principle " 'where a policy is renewed without actual notice to the insured that the policy has been altered.' " *Koski v Allstate Ins Co*, 213 Mich App 166, 170 (1995), quoting *Parmet Homes, Inc v Republic Ins Co*, 111 Mich App 140, 145 (1981). If a renewal policy is issued without calling the insured's attention to a reduction in coverage, the insurer is bound to the greater coverage in the earlier

[8] *In re Cotton*, 208 Mich App at 185.

policy. *Koski*, 213 Mich App at 170. This exception is generally known as the "renewal rule." I would grant defendant's application for leave to appeal because, in my judgment, this Court should closely consider whether plaintiff can avail herself of this rule in this case.

Plaintiff, Cynthia Ruzak, was injured while riding in a car driven by her husband, Jay Ruzak. The Ruzaks had an automobile insurance policy through defendant, USAA Insurance Agency, Inc. They assert that they had obtained automobile insurance through defendant since 1966. The Ruzaks had moved to Michigan in 1997, and received a new policy through defendant providing coverage under Michigan law. The policy limits for bodily injury were $300,000 for an individual and $500,000 per occurrence. However, the policy contained a limitation for claims filed by a family member against a named insured. In this circumstance, the policy limits for bodily injury were $20,000/$40,000, the minimums permitted under Michigan law.

Immediately before they moved to Michigan, the Ruzaks lived in Indiana. The Indiana policy contained a *complete* exclusion for claims by a family member against a named insured. Allowing the lower courts' rulings to stand binds defendant here by the renewal rule to the greater coverage in the policy, even though the policy's clear terms expressly limit coverage in the present situation. This application of the renewal rule deserves further consideration for two reasons. First, it is unclear whether the policy at issue can properly be deemed a "renewal." Insurance regulation is a matter of state law, and when the Ruzaks moved to Michigan, Mr. Ruzak received a policy that conformed to Michigan law. I am not yet persuaded that an insured in these circumstances could reasonably expect that coverage under the new policy would be identical to that under the old policy—that is, that the policy would even be considered a true "renewal." Thus, I am not yet persuaded that he is relieved of his obligation to actually read his policy. Second, applying the renewal rule on these facts is problematic because the Michigan policy actually *increased* the coverage from that of the Indiana policy. The renewal rule has previously applied only when there has been a "reduction in coverage." *Koski*, 213 Mich App at 170. Had the accident occurred while the Indiana policy was in effect, plaintiff would not have been covered at all. For these reasons, I would grant leave to consider the application of the renewal rule in this case.

CORRIGAN, J., joined the statement of MARKMAN, J.

HADDEN v MCDERMITT APARTMENTS, LLC, No. 140618; Reported below: 287 Mich App 124.

MARKMAN, J. (*dissenting*). The instant dispute—whether a landlord has breached his obligation to keep common areas "fit for the use intended by the parties," MCL 554.139(1)(a)—is governed by *Allison v AEW Capital Mgt*, 481 Mich 419 (2008). I would grant leave to appeal to determine whether there are reasonable grounds, as the Court of Appeals found, for distinguishing *Allison* in this case.

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

In re CELL, No. 141970; Court of Appeals No. 296598.

Summary Disposition November 22, 2010:

PEOPLE v MARIO JOHNSON, No. 140336; Court of Appeals No. 293833. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court, and we remand this case to the trial court for resentencing in light of *People v Hendrick*, 472 Mich 555 (2005). On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003).

PEOPLE v DEONTAE DAVIS, No. 141572; Court of Appeals No. 290131. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of an issue raised by the defendant but not addressed in that court's opinion: whether the circuit court erroneously allowed the statement of the defendant's codefendant, Caprice Mack, to be introduced into evidence through the preliminary examination testimony of Travis Crowley. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v GACOLBY MOORE, No. 141716; Court of Appeals No. 298130. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for the appointment of substitute appellate counsel, in light of *Halbert v Michigan*, 545 US 605 (2005). Based on our review of the record, the Oakland Circuit Court erred in failing to timely appoint appellate counsel. This delay, in turn, led the defendant to seek appellate relief in the Court of Appeals beyond the 12-month deadline in MCR 7.205(F)(3). We further note that on July 14, 2010, the circuit court entered an order granting appointed counsel's motion to withdraw and also granting the appointment of substitute counsel, but there is no indication that substitute counsel was in fact appointed. Once appointed, substitute counsel may file an application for leave to appeal in the Court of Appeals, and/or any appropriate postconviction motions in the trial court, within six months of the date of the circuit court's order appointing counsel. Counsel may include among the issues raised, but is not required to include, the issue raised by the defendant in his application for leave to appeal in this Court. In all other respects, the application for leave to appeal and the motion to remand are denied, because we are not persuaded that the questions presented should now be reviewed by this Court. We do not retain jurisdiction.

Leave to Appeal Denied November 22, 2010:

PEOPLE v CORR, No. 140750; reported below: 287 Mich App 499.

ABOUDAYA v AUTO CLUB INSURANCE ASSOCIATION, No. 140907; Court of Appeals No. 294261.

DECKER v STOIKO, Nos. 141049, 141050, and 141051; reported below: 287 Mich App 666.

PEOPLE v MALONE, No. 141124; reported below: 287 Mich App 648.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v CLARDY, No. 141180; Court of Appeals No. 296415.

PEOPLE v STEVENS, No. 141183; Court of Appeals No. 296912.

PEOPLE v TYRONE BELL, No. 141193; Court of Appeals No. 295328.

PEOPLE v RAILER, No. 141208; reported below: 288 Mich App 213.

PEOPLE v BENNY PARKER, No. 141214; reported below: 288 Mich App 500.

PEOPLE v FAIRCHILD, No. 141243; Court of Appeals No. 297225.

PINE BLUFFS AREA PROPERTY OWNERS ASSOCIATION, INCORPORATED v DEWITT LANDING AND DOCK ASSOCIATION, No. 141251; reported below: 287 Mich App 690.

KIRCOS v WASLAWSKI, No. 141274; Court of Appeals No. 288894.

PEOPLE v VERMETT, No. 141277; Court of Appeals No. 295805.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v REYBURN, No. 141285; Court of Appeals No. 297283.

PEOPLE v KEVIN WASHINGTON, No. 141301; Court of Appeals No. 287091.

PEOPLE v VASQUEZ, No. 141314; Court of Appeals No. 297621.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v WINTERS, No. 141350; Court of Appeals No. 288925.

PEOPLE v MOSHER, No. 141352; Court of Appeals No. 290286.

HALL v COHEN, No. 141361; Court of Appeals No. 286336.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v BEACH, No. 141364; Court of Appeals No. 297990.

PEOPLE v JEFFREY CHAPMAN, No. 141383; Court of Appeals No. 290553.

BODRIE v TUSCOLA CIRCUIT COURT, No. 141387; Court of Appeals No. 296635.

PEOPLE v FINCH, No. 141393; Court of Appeals No. 296933.

PEOPLE v CORSO, No. 141406; Court of Appeals No. 290666.

PEOPLE v FYDA, No. 141414; reported below: 288 Mich App 446.

PEOPLE v KRISTOPHER THOMPSON, No. 141416; Court of Appeals No. 289033.

PEOPLE v REGAINS, No. 141427; Court of Appeals No. 297703.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v BURNETT, No. 141431; Court of Appeals No. 296436.

GILL v DEPARTMENT OF CORRECTIONS, No. 141433; Court of Appeals No. 297042.

KABALA v JP MORGAN CHASE BANK, No. 141434; Court of Appeals No. 288896.

ALPHA CAPITAL MANAGEMENT, INCORPORATED v RENTENBACH, No. 141435; reported below: 287 Mich App 589.

PEOPLE v WINSTON BRIGGS, No. 141436; Court of Appeals No. 284649.

JOSEPH CHEVROLET, INCORPORATED v HUNT, No. 141446; Court of Appeals No. 290882.

PEOPLE v RONNIE WILLIAMS, No. 141466; Court of Appeals No. 297404.

NATIONAL GENERAL INSURANCE COMPANY v HOME-OWNERS INSURANCE COMPANY, Nos. 141473 and 141474; Court of Appeals Nos. 291131 and 291132.

PEOPLE v WASNICH, No. 141496; Court of Appeals No. 297853.

PEOPLE v STRONG, No. 141497; Court of Appeals No. 290123.

PEOPLE v HAMIN DIXON, No. 141499; Court of Appeals No. 298182.

PEOPLE v HAMIN DIXON, No. 141501; Court of Appeals No. 298204.

PEOPLE v RUDY THOMAS, No. 141502; Court of Appeals No. 284982.

PEOPLE v HEIBEL, No. 141514; Court of Appeals No. 298073.

PEOPLE v RILEY EVANS, No. 141521; Court of Appeals No. 296576.

REESOR v NORMAN YATOOMA & ASSOCIATES, Nos. 141534 and 141535; Court of Appeals Nos. 289400 and 289427.

HILLS AND DALES GENERAL HOSPITAL v OXHOLM-DABABNEH, Nos. 141544 and 141545; Court of Appeals Nos. 297227 and 297533.

CATRO v UNDERWOOD PROPERTY MANAGEMENT COMPANY, No. 141558; Court of Appeals No. 288251.

PEOPLE v PERKINS, No. 141567; Court of Appeals No. 289819.

PEOPLE v STONE, No. 141576; Court of Appeals No. 298301.

PEOPLE v URBANAWIZ, No. 141577; Court of Appeals No. 296529.

PEOPLE v MCCLINTON, No. 141578; Court of Appeals No. 296716.

PEOPLE v MCMURRAY, No. 141581; Court of Appeals No. 291355.

PEOPLE v GILMORE, No. 141582; Court of Appeals No. 298064.

PEOPLE v CARLOS GARCIA, No. 141584; Court of Appeals No. 289432.

PEOPLE v DOSS, No. 141587; Court of Appeals No. 298170.

BENDURE & THOMAS v GOLDEN, No. 141588; Court of Appeals No. 291901.

CORONA CONSTRUCTION, INCORPORATED v GRAY, No. 141596; Court of Appeals No. 295576.

PEOPLE v TILSON, No. 141607; Court of Appeals No. 291307.

PEOPLE v LAFRANCE, No. 141612; Court of Appeals No. 298149.

CURRY v AMERICAN AXLE & MANUFACTURING COMPANY, No. 141614; Court of Appeals No. 292403.

PEOPLE v MABINS, Nos. 141615, 141616, 141617, and 141618; Court of Appeals Nos. 290792, 290793, 290794, and 290795.

PEOPLE v ROBERT CHAPMAN, No. 141626; Court of Appeals No. 297610.

MARTEL v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 141630; Court of Appeals No. 296687.

PEOPLE v HOLLINGSWORTH, No. 141631; Court of Appeals No. 298021.

PEOPLE v RESOR, No. 141632; Court of Appeals No. 292290.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v TOBIAS, No. 141637; Court of Appeals No. 298104.

PEOPLE v KEITH CARTER, No. 141639; Court of Appeals No. 289986.

SIMONSON v PELTON, No. 141645; Court of Appeals No. 291465.

PEOPLE v PUTTICK, No. 141646; Court of Appeals No. 286176.

PEOPLE v LARKIN, No. 141651; Court of Appeals No. 291721.

HLYWA v LIBERTY PARK OF AMERICA, No. 141655; Court of Appeals No. 291759.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

OAKHILL LP, INCORPORATED v TOWNSHIP OF SHELBY, Nos. 141660 and 141661; Court of Appeals Nos. 291238 and 291239.

JNCC, LLC v METROPOLITAN TITLE COMPANY, No. 141685; Court of Appeals No. 290915.

PEOPLE v WILLIE MOORE, No. 141709; Court of Appeals No. 298737.

PEOPLE v TENICIA NASH, No. 141711; Court of Appeals No. 296843.

PEOPLE v HAMMONDS, No. 141717; Court of Appeals No. 298445.

PEOPLE v CERVI, No. 141720; Court of Appeals No. 292600.

BALDWIN v AMERICAN AXLE & MANUFACTURING HOLDINGS, No. 141791; Court of Appeals No. 291117.

HATHAWAY, J., did not participate due to a familial relationship with counsel of record.

Superintending Control Denied November 22, 2010:

MARSHALL v ATTORNEY GRIEVANCE COMMISSION, No. 141613.

SPILLANE v ATTORNEY GRIEVANCE COMMISSION, No. 141628.

Reconsideration Denied November 22, 2010:

In re KADZBAN, No. 140099; Court of Appeals No. 292516. Leave to appeal denied at 488 Mich 862.

TUCKER v CAPITAL AREA TRANSPORTATION AUTHORITY, No. 140293; Court of Appeals No. 288367. Leave to appeal denied at 486 Mich 974.

CORRIGAN, J., would grant reconsideration and, on reconsideration, would grant leave to appeal for the reasons set forth in her dissenting statement in this case, 486 Mich 974 (2010).

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

FEYZ v MERCY MEMORIAL HOSPITAL, Nos. 140582 and 140583; Court of Appeals Nos. 285880 and 289226. Leave to appeal denied at 488 Mich 852.

PEOPLE v TERRY BREEDING, No. 140703; Court of Appeals No. 289225. Leave to appeal denied at 486 Mich 1046.

PEOPLE v SCARBOROUGH, No. 140705; Court of Appeals No. 286545. Leave to appeal denied at 486 Mich 1046.

PEOPLE v KEVIN HILL, No. 140714; Court of Appeals No. 287226. Leave to appeal denied at 486 Mich 1046.

PEOPLE v TOWNSEND, No. 140717; Court of Appeals No. 288389. Leave to appeal denied at 488 Mich 852.

PEOPLE v LOCKWOOD, No. 140731; Court of Appeals No. 287085. Leave to appeal denied at 487 Mich 854.

PEOPLE v DAVID HARDY, No. 140887; Court of Appeals No. 287181. Leave to appeal denied at 487 Mich 855.

PEOPLE v BRANNON, No. 141093; Court of Appeals No. 292617. Summary disposition at 486 Mich 1070.

WILSON v RIEBSCHLEGER, No. 141275; Court of Appeals No. 289009. Leave to appeal denied at 488 Mich 857.

Summary Disposition November 24, 2010:

GEICO INDEMNITY COMPANY v GOLDSTEIN, Nos. 140662 and 141196; Court of Appeals No. 288418. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate part III(B) of the Court of Appeals' opinion and remand this case to the Court of Appeals for consideration of the issue whether, because the titled owner of the vehicle involved in the accident maintained an automobile insurance policy on the vehicle issued by plaintiff Geico Indemnity, and Geico, in turn, filed the written certification with the state of Michigan required under MCL 500.3163(1), the resulting no-fault coverage satisfied the condition for eligibility for personal protection insurance benefits specified by MCL 500.3113(b), even if defendant Goldstein was an "owner" of the vehicle within the meaning of MCL 500.3101(h)(*i*), thereby obviating any need for the further proceedings ordered by the Court of Appeals. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v DONALD HART, No. 141176; Court of Appeals No. 296528. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Clinton Circuit Court. On September 27, 2004, the parties filed a stipulation to amend the judgment of sentence, conditioned on whether *Blakely v Washington*, 542 US 296 (2004), was applicable to Michigan's indeterminate sentencing scheme. The stipulation provides that the May 21, 2003, judgment of sentence shall be amended if *Blakely* does not apply in Michigan. In *People v Drohan*, 475 Mich 140 (2006), cert den sub nom *Drohan v Michigan*, 549 US 1037 (2006), this Court determined that *Blakely* is not applicable to Michigan's indeterminate sentencing scheme. In accord, *Montes v Trombley*, 599 F3d 490, 498 (CA 6, 2010). On remand, the trial court shall review the judgment of sentence, determine if it has been amended in accordance with the stipulation, and, if not, amend it accordingly. In all

other respects, leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v TYSON O'NEAL, No. 141218; Court of Appeals No. 296018. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court. The trial court's January 21, 2009, opinion and order states that the defendant's judgment of sentence incorrectly showed the defendant as a fourth felony offender, when it should have designated him a second felony offender, and noted that a corrected judgment of sentence would be sent to the Department of Corrections. The copy of the judgment of sentence in the record does not reflect that the amendment or correction has been made. On remand, the circuit court shall assure that an amended judgment of sentence is prepared and transmitted to the Department of Corrections. In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The motions to remand and for appointment of counsel are denied.

PEOPLE v JOSEPH GENTILE, No. 141298; Court of Appeals No. 295570. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

KELLY, C.J., would grant leave to appeal.

PEOPLE v EDWARD HART, No. 141482; Court of Appeals No. 288216. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the defendant's convictions for child sexually abusive activity under MCL 750.145c(2), and we remand this case to the Wayne Circuit Court for entry of judgments of conviction for possession of child sexually abusive material and resentencing under MCL 750.145c(4). *People v Hill*, 486 Mich 658 (2010). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

CORRIGAN, J. (*concurring*).I concur in the order vacating defendant's convictions under MCL 750.145c(2) because this course of action is consistent with the majority opinion in *People v Hill*, 486 Mich 658 (2010). I write separately only to reiterate my disagreement with that majority opinion—which I conclude incorrectly interpreted MCL 750.145c(2)—as expressed by Justice YOUNG's dissenting opinion in *Hill*, which I joined.

YOUNG, J. (*concurring*). While I recognize that *People v Hill*, 486 Mich 658 (2010), controls the outcome in this case, I continue to adhere to my dissenting opinion in *Hill*.

KELLY, C.J., would grant leave to appeal.

MACOMB COUNTY PROSECUTOR v OSANTOWSKI, Nos. 141492 and 141494; Court of Appeals No. 291628. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of

Appeals, and we reinstate the Parole Board decision. The Parole Board did not abuse its discretion in granting parole to the defendant. The decision to grant parole was based on evaluation of objective criteria established by Michigan Department of Corrections policy directives that were required by statute, and was within the range of principled outcomes.

YOUNG, J., would grant leave to appeal.

Leave to Appeal Granted November 24, 2010:

PEOPLE v KENT LEE, No. 141570; reported below: 288 Mich App 739. The parties shall include among the issues to be briefed whether the trial court's order that the defendant be required to register under the Sex Offenders Registration Act (SORA), entered after the defendant had been sentenced and had begun serving his sentence, was valid, and, whether the defendant's touching of the victim's genitals "by its nature constitutes a sexual offense against an individual who is less than 18 years of age" within the meaning of MCL 28.722(e)(*xi*) such that the defendant is required to register under SORA.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v KOWALSKI, No. 141695; Court of Appeals No. 288855. The parties shall include among the issues to be briefed (1) whether the Court of Appeals erred when it determined (a) that the trial court's jury instructions failed to apprise the jurors of the *actus reus* of the crime of accosting, enticing, or soliciting a child for immoral purposes, MCL 750.145a, and (b) that the error was not harmless beyond a reasonable doubt; (2) whether the defendant waived the instructional error, and if so, whether his attorney provided ineffective assistance of counsel; and (3) whether, when viewed in a light most favorable to the prosecution, the evidence presented at trial was sufficient to enable a rational jury to find that the *actus reus* of the charged offense was proven beyond a reasonable doubt.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v SAMMIE BAILEY, No. 141739; Court of Appeals No. 278411.

[As amended on reconsideration by order of the Supreme Court entered February 3, 2011—REPORTER.]

The parties shall address (1) whether the court erroneously instructed the jury as to the effect of provocation on a claim of self-defense and (2) whether the reasonable doubt standard is suffi-

ciently expressed when the court instructs the jury that, if there was a realistic or reasonable possibility that the defendant acted in self-defense, he is not guilty.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied November 24, 2010:

ALLEN v AHARAUKA, No. 138943; Court of Appeals No. 283890.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v HOBBS, No. 140135; Court of Appeals No. 294249.

PEOPLE v GILLIARD, No. 140932; Court of Appeals No. 296425.

KELLY, C.J., would remand this case to the Court of Appeals for consideration as on leave granted.

MOODY v LAWSON, No. 141001; Court of Appeals No. 287686.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

TIERNAN v DIETRICH, No. 141065; Court of Appeals No. 278975.

MCCUE v DEPARTMENT OF TRANSPORTATION, No. 141069; Court of Appeals No. 295235.

KELLY, C.J., and HATHAWAY, J., would remand this case to the Court of Appeals for consideration as on leave granted.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

LINDEN v ST JOHN HOSPITAL, Nos. 141289 and 141291; Court of Appeals Nos. 296798 and 296799.

KELLY, C.J., and HATHAWAY, J., would grant leave to appeal.

PEOPLE v JARRON GEORGE, No. 141412; Court of Appeals No. 288258.

YOUNG, J. (*concurring*). Although I recognize this Court's decision in *People v Katt*, 468 Mich 272 (2003), controls the application of MRE 803(24), I continue to adhere to the positions stated in my dissenting opinion in *Katt*.

KELLY, C.J., would grant leave to appeal.

PEOPLE v DANIEL JACKSON, No. 141438; Court of Appeals No. 291199.

PEOPLE v BECKEM, No. 141526; Court of Appeals No. 298057.

BURNETT v ULRICH, No. 141673; Court of Appeals No. 296907. As plaintiff Jeffery R. Burnett has repeatedly abused the court system with

malicious and/or frivolous filings, we direct the clerks of this Court, the Court of Appeals, and the Chippewa Circuit Court not to accept any further filings in noncriminal matters unless Mr. Burnett has paid all necessary fees and submitted his filings in full compliance with the court rules.

Leave to Appeal Granted November 30, 2010:

PEOPLE v LIKINE, No. 141154; reported below: 288 Mich App 648. The parties shall address whether the rule of *People v Adams*, 262 Mich App 89 (2004)—holding that inability to pay is not a defense to the crime of felony non-support under MCL 750.165—is unconstitutional. See *Port Huron v Jenkinson*, 77 Mich 414 (1889).

We further order that this case be argued and submitted to the Court together with the cases of *People v Parks* (Docket No. 141181) and *People v Harris* (Docket No. 141513) at such future session of the Court as the cases are ready for submission. Each side will have 30 minutes for oral argument.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v PARKS, No. 141181; Court of Appeals No. 291011. The parties shall address whether the rule of *People v Adams*, 262 Mich App 89 (2004)—holding that inability to pay is not a defense to the crime of felony non-support under MCL 750.165—is unconstitutional. See *Port Huron v Jenkinson*, 77 Mich 414 (1889).

We further order that this case be argued and submitted to the Court together with the cases of *People v Likine* (Docket No. 141154) and *People v Harris* (Docket No. 141513) at such future session of the Court as the cases are ready for submission. Each side will have 30 minutes for oral argument.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v SCOTT HARRIS, No. 141513; Court of Appeals No. 297182. The parties shall address (1) whether the rule of *People v Adams*, 262 Mich App 89 (2004)—holding that inability to pay is not a defense to the crime of felony non-support under MCL 750.165—is an incorrect reading of the statute or unconstitutional, see *Port Huron v Jenkinson*, 77 Mich 414 (1889); (2) whether the trial court abused its discretion when it denied the defendant's postsentencing motion to withdraw his plea; and (3)

whether the trial court erred when it adopted the child support arrearage amount that had been determined by family court as the restitution to be imposed in this criminal case or whether the defendant waived that issue.

We further order that this case be argued and submitted to the Court together with the cases of *People v Likine* (Docket No. 141154) and *People v Parks* (Docket No. 141181) at such future session of the Court as the cases are ready for submission. Each side will have 30 minutes for oral argument.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

YOUNG, J. (*dissenting*). Because defendant's unconditional guilty plea to felony non-support waived any claim that defendant was constitutionally entitled to raise an indigency defense, I dissent from the order granting leave to appeal.

Pursuant to the *Cobbs*[1] evaluation provided by the trial court, defendant pleaded guilty of felony non-support[2] in exchange for a payment arrangement that would permit defendant to avoid incarceration. Specifically, defendant *agreed* to pay $3,000 by December 8, 2008, at which point his sentencing would be adjourned for six months. If defendant paid an additional $5,000 toward his arrearage by the end of the six month period, he would avoid incarceration altogether. Defendant's guilty plea contained no conditions. When defendant had not paid the agreed-upon amount by the agreed-upon time, he was sentenced to a term of imprisonment within the sentencing guidelines. Nine months after sentencing, defendant raised *for the first time* his claim of indigency in his motion to withdraw his guilty plea.

An unconditional guilty plea that is knowing and intelligent—and defendant makes no claim that his guilty plea was otherwise—waives claims of error on appeal, even claims of constitutional dimension.[3] Two recognized exceptions to this rule exist. The first recognized exception is that the court below lacked subject-matter jurisdiction over the case, "because it involves a court's power to hear a case, [which] can never be forfeited or waived."[4] The second exception is the defendant's right "not to be haled into court at all,"[5] which implicates "the very *authority* of the state to bring a defendant to trial," not merely "the factual determination

---

[1] *People v Cobbs*, 443 Mich 276 (1993).

[2] Defendant also acknowledged being a third-offense habitual offender, MCL 769.12.

[3] See *People v New*, 427 Mich 482 (1986).

[4] *United States v Cotton*, 535 US 625, 630 (2002).

[5] *Blackledge v Perry*, 417 US 21, 30-31 (1974); *Menna v New York*, 423 US 61, 62-63 & n 2 (1975).

of defendant's guilt."[6] An example of this exception is a claim that a charged offense violated the Double Jeopardy Clause, which may be appealed despite a defendant's admitted guilt.[7]

As none of defendant's claims falls into either of these exceptions, his claims of error have been waived by his guilty plea. I would deny leave to appeal.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered November 30, 2010:

DRIVER v CARDIOVASCULAR CLINICAL ASSOCIATES, No. 140922; reported below: 287 Mich App 339. At oral argument, the parties shall address whether this Court's decision in *Bush v Shabahang*, 484 Mich 156 (2009), allows for the application of MCL 600.2301 in cases involving prematurely filed complaints under MCL 600.2912b(1) and whether *Burton v Reed City Hosp Corp*, 471 Mich 745 (2005), retains any viability in light of *Bush*. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The Michigan Association for Justice, Michigan State Medical Society, Michigan Health and Hospital Association, and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Reconsideration Granted November 30, 2010:

DUNCAN v STATE OF MICHIGAN, Nos. 139345, 139346, and 139347; reported below: 284 Mich App 246. Summary disposition at 486 Mich 906; reconsideration granted at 486 Mich 1071. On order of the Court, the motion for reconsideration of this Court's July 16, 2010, order is considered, and it is granted. We vacate our order dated July 16, 2010, and we reinstate our order in this case dated April 30, 2010, because reconsideration thereof was improperly granted. We do not retain jurisdiction.

Dissenting statement of CORRIGAN, J., to follow.

DAVIS, J. (*concurring*). I agree with Chief Justice KELLY's dissent from the July 16, 2010, order, stating that the prior motion for reconsideration should have been denied because it added nothing new. To the extent the unanimous April 30, 2010, order was reconsidered because of concerns

---

[6] *New*, 427 Mich at 491, quoting *People v White*, 411 Mich 366, 398 (1981) (MOODY, J., concurring in part and dissenting in part).

[7] *Menna*, 423 US at 63 n 2.

that it could not be complied with, I have reviewed the record thoroughly and I do not agree with those concerns. Furthermore, if those concerns eventually prove warranted, the trial court should, and is in the best position to, make that evaluation. The trial court has not yet had the opportunity to do so. As the April 30, 2010, order stated, this case is at its earliest stages and a decision on its substantive merits is premature, but class certification should be reconsidered in light of *Henry v Dow Chem Co*, 484 Mich 483 (2009). The original, unanimous order of this Court was correct, and no sufficient basis was presented for this Court to have reconsidered it.

HATHAWAY, J., joined the statement of DAVIS, J.

CORRIGAN, J., stated as follows: I object to the release of the Court's order without my dissenting statement and I reserve the right to file one as soon as I can. The majority has decided to grant the motion for reconsideration, and to reverse our previous order, without affording disagreeing justices sufficient time to adequately respond to this decision. Instead, the majority has now decided to expedite the release of its order regardless of the fact that I have worked in a timely fashion to prepare a dissenting statement, but have not yet completed such a statement. This is contrary to our practice during the 11 years I have served on this Court. The Court's decision to suddenly expedite this case seems designed to prevent the new Court after January 1, 2011, from considering a motion for reconsideration.

MARKMAN, J. (*dissenting*). I dissent from the order granting plaintiffs' motion for reconsideration, vacating this Court's July 16, 2010, order, and reinstating this Court's April 30, 2010, order. The July 16 order vacated the April 30 order and held that "[t]he defendants are entitled to summary disposition because, as the Court of Appeals dissenting opinion recognized, the plaintiffs' claims are not justiciable." In a concurring statement, I explained that our April 30 order was erroneous for two reasons:

> First, as defendants observe, this order vacated the Court of Appeals' opinion without articulating any governing standards. Second, it is not premature to decide this case because the precise issue presented is whether plaintiffs have stated a claim on which relief can be granted, and this, as well as the threshold justiciability issues, can be determined on the face of the complaint. [*Duncan v Michigan*, 486 Mich 1071 (2010) (MARKMAN, J., concurring).]

In addition, I concluded that defendants are entitled to summary disposition for the following reasons set forth in the Court of Appeals dissent:

> (1) The United States Supreme Court in *Gideon v Wainwright*, 372 US 335 (1963), and *Strickland v Washington*, 466 US 668 (1984), "was concerned with results, not process. It did not presume to tell the states *how* to ensure that indigent criminal defendants receive effective assistance of counsel." *Duncan v Michigan*, 284 Mich App 246, 357 (2009) (WHITBECK, J., dissenting).

(2) Plaintiffs' claims would have "the judiciary override the Michigan system of local control and funding of legal services for indigent criminal defendants," despite the absence here of any constitutional violation. *Id*. at 358.

(3) Plaintiffs' claims are not sufficient to create a presumption of either prejudice, or prejudice per se, that would warrant either declaratory or injunctive relief. *Id*. at 361.

(4) Plaintiffs lack standing, and, therefore, their claims are not justiciable. *Id*. at 371.

(5) Plaintiffs' claims are not ripe for adjudication, and, therefore, their claims are not justiciable. *Id*. at 371, 376.

(6) Plaintiffs' claims are not justiciable and, therefore, the relief they seek should not be granted. *Id*. at 385.

(7) In finding a justiciable controversy, the Court of Appeals erred in adopting a number of assumptions that are conjectural and hypothetical, including assumptions that plaintiffs and the class they purport to represent will be convicted of the crimes with which they are charged, that such convictions will result from prejudice stemming from ineffective assistance of counsel, that such ineffective assistance will be attributable to the inaction of defendants, and that trial and appellate judges will be unable or unwilling to afford relief for such violations of the Sixth Amendment. *Id*. at 368-370.

(8) There is no constitutional precedent that "guarantees an indigent defendant a particular attorney" or an "attorney of a particular level of skill" [as long as the attorney is not "so deficient as to cause prejudice"]; that requires that a "predetermined amount of outside resources be available to an attorney"; or that requires that there be a "meaningful relationship with counsel." *Id*. at 370[, 384].

(9) The Court of Appeals' assertions that affording plaintiffs injunctive relief "could potentially entail a cessation of criminal prosecutions against indigent defendants," *id*. at 273 (majority opinion), and "that nothing in this opinion should be read as foreclosing entry of an order granting the type of relief so vigorously challenged by defendants," *id*. at 281, accurately describe the potential consequences of its opinion, which consequences would constitute an altogether unwarranted and improper response to plaintiffs' claims. *Id*. at 380-385 (WHITBECK, J., dissenting).

(10) The Court of Appeals has "issued an open invitation to the trial court to assume ongoing operational control over the systems for providing defense counsel to indigent criminal defendants in Berrien, Genesee, and Muskegon counties." *Id*. at 383. And with that invitation comes a "blank check" on the part of the judiciary to "force sufficient state level legislative appropriations and executive branch acquiescence" in assuming similar control over the systems in every county in this state, while "nullify[ing] the provisions" of the criminal defense act and "superseding the

> authority of the Supreme Court and the State Court Administrator." *Id*. at 383-384. [*Id.* at 1072.]

Because plaintiffs have not presented anything in the present motion for reconsideration that causes me to believe that the above reasons do not continue to justify our decision to reverse the Court of Appeals, I would deny plaintiffs' motion for reconsideration.

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

[By order entered December 22, 2010, the Supreme Court directed publication of the following statements with this order—REPORTER.]

KELLY, C.J. (*concurring*). I concur in the order granting plaintiffs' motion for reconsideration and reinstating our order of April 30, 2010. I write separately to avoid the confusion that I believe is likely given the history of this case and the statements of the dissenting justices.

The dissenters have yet to raise a single argument of which the Court was unaware when it originally decided this case eight months ago. Indeed, Justice MARKMAN's dissenting statement consists almost entirely of a series of quotations from the Court of Appeals dissenting opinion. He also claims that it is not premature to make a final decision on this case because the issues involved are fully laid out on the face of the complaint. We rejected that precise argument in our April order.

Nor are Justices CORRIGAN, YOUNG and MARKMAN correct that our July 16, 2010, order granting reconsideration was warranted because our April order failed to articulate a governing standard for the trial court. Our April order affirmed only the result reached by the Court of Appeals. Such orders are hardly earth-shattering occurrences;[1] hence, all justices were clearly aware at the time our April order entered that we were not articulating a governing standard for the trial court.[2] Yet no one on the Court stated a need for one. Nothing happened between April and July that gave rise to a need for the Court to articulate a governing standard.

Moreover, the thrust of the dissenters' position is that our failure to articulate a standard somehow makes summary disposition for defendants a more suitable outcome. In my view, such a conclusion is tantamount to throwing up one's hands in futility in the face of a thorny legal question. If the dissenters' concerns are genuine, why would not the proper remedy be to grant reconsideration and issue an opinion or order setting such a standard?

---

[1] See, e.g., *Andres v Brown*, 482 Mich 985 (2008) (affirming the result reached by the Court of Appeals for different reasons); *Citizens Protecting Michigan's Constitution v Secretary of State*, 482 Mich 960 (2008) (affirming the result only of the Court of Appeals' judgment without further explanation).

[2] See *Duncan v Michigan*, 486 Mich 1071, 1074 (2010) (KELLY, C.J., dissenting).

Finally, Justice CORRIGAN states that issuing our November 30, 2010, order without her dissenting statement constitutes an "unprecedented" act.[3] She is incorrect. Such action has in fact occurred in the past.[4] The same action was warranted in this unique case because the case (1) involves issues important to this state's jurisprudence, (2) is three years old despite the fact that discovery has not even begun, and (3) has languished in this Court for almost a year (two motions for reconsideration have been brought).

In sum, our April order was correct then and it is correct now. Therefore, I concur in the order granting plaintiffs' motion for reconsideration and reinstating our April order.

CORRIGAN, J. (*dissenting*). I join Justice MARKMAN's dissenting statement in full. I would deny plaintiffs' motion for reconsideration of the July 16, 2010, order. I write separately to point out the procedural history that has brought us to this juncture and to further make clear the defects in the initial April 30, 2010, order that necessitated the grant of defendants' motion for reconsideration.

In this case, indigent criminal defendants in three Michigan counties brought claims alleging that they, as well as future indigent defendants, were being denied their constitutional rights to counsel and the effective assistance of counsel. After the trial court denied defendants' motion for summary disposition and granted class certification, defendants sought leave to appeal in the Court of Appeals. The Court of Appeals granted leave, and on June 11, 2009, it affirmed the trial court's denial of defendants' motion for summary disposition and the grant of class certification in a 2-1 decision. *Duncan v Michigan*, 284 Mich App 246 (2009). We subsequently granted leave. *Duncan v Michigan*, 485 Mich 1003 (2009). After hearing oral arguments in April 2010, we issued an order on April 30, 2010, vacating the trial court's grant of class certification and remanding for consideration of class certification in light of *Henry v Dow Chem Co*, 484 Mich 483 (2009). *Duncan v Michigan*, 486 Mich 906 (2010). In regard to defendants' motion for summary disposition, we affirmed only the result of the Court of Appeals majority for different reasons based on the rationale that it was premature to make a decision on the substantive issues based solely on plaintiffs' pleadings. *Id*. Defendants then filed a motion for reconsideration, which we granted by a vote of 4-3 on July 16, 2010. *Duncan v Michigan*, 486 Mich 1071 (2010). On August 6, 2010, plaintiffs filed a motion for reconsideration of the

---

[3] *Post* at 962.

[4] See, e.g., *People v Limmer*, 461 Mich 974 (2000). In *Limmer*, we issued an order on March 8, 2000 denying leave to appeal but stating that then-Chief Justice WEAVER and Justices CORRIGAN and MARKMAN would have granted leave to appeal and dissenting statements would follow. The order was amended April 18, 2000, to add a dissenting statement by Justice CORRIGAN, joined by then-Chief Justice WEAVER and Justice MARKMAN. [The full text of the *Limmer* orders was not published in the *Michigan Reports*, but the orders were published at 609 NW2d 193 and 612 NW2d 395—REPORTER.]

July 16, 2010 order, which the majority now grants.[1] Despite my objection,[2] the majority issued the order granting plaintiffs' motion for reconsideration on November 30, 2010, without my dissent in an act virtually unprecedented in the 11 years I have served on this Court.[3]

I believe, as JUSTICE MARKMAN sets forth, that we properly granted defendants' motion for reconsideration of the initial order and that

---

[1] In the interim between plaintiffs' motion and the order issued here, Justice WEAVER, who voted in favor of defendants' prior motion for reconsideration, resigned, and Justice DAVIS, who now votes in favor of plaintiffs' motion for reconsideration, was appointed to take her seat on the Court.

[2] My objection, included with the November 30, 2010 order, stated:

> I object to the release of the Court's order without my dissenting statement and I reserve the right to file one as soon as I can. The majority has decided to grant the motion for reconsideration, and to reverse our previous order, without affording disagreeing justices sufficient time to adequately respond to this decision. Instead, the majority has now decided to expedite the release of its order regardless of the fact that I have worked in a timely fashion to prepare a dissenting statement, but have not yet completed such a statement. This is contrary to our practice during the 11 years I have served on this Court. The Court's decision to suddenly expedite this case seems designed to prevent the new Court after January 1, 2011, from considering a motion for reconsideration.

[3] I am aware of only one other instance in which this course of action was taken in regard to dissenting statements during my time on this Court. See *People v Limmer*, 461 Mich 974 (2000). The circumstances of *Limmer*, however, are far different from the circumstances here. In that case, the dissenting justices did not object but concurred in the delayed release due to the evident emergency based on the application for leave to appeal occurring in the midst of trial. Further, the order denying leave to appeal with dissenting statements to follow was issued within three days of the prosecution's filing its emergency application. Similar circumstances are clearly not present here. The initial order denying leave in *Limmer* stated:

> On order of the Court, the application for leave to appeal from the March 6, 2000 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court. The motion to waive production of transcript is thereby moot and is DENIED. The stay order entered March 7, 2000 is VACATED.
>
> WEAVER, C.J., and CORRIGAN and MARKMAN, JJ., would grant leave to appeal and dissenting statements will follow. [*Id*.] [The full text

defendants are entitled to summary disposition. I write to emphasize that the majority's decision to reinstate the initial order does not rectify our failure to articulate any governing standards in the initial order. Rather,

---

of the order, entered March 8, 2000, Docket No. 116458, was not published in the *Michigan Reports*, but was published at 609 NW2d 193—REPORTER.]

The subsequent amended order in *Limmer* stated:

> In an order dated March 8, 2000, this Court denied leave to appeal. Several members of the Court indicated that they would grant leave to appeal and that dissenting statements would follow. The dissenting statement, as joined in by two members of the Court, reads as follows:
>
> CORRIGAN, J. Under the current governing standards in Michigan, the prosecution's application cannot succeed. Nonetheless, I would grant leave to appeal to revisit this Court's conclusion in *People v Nix*, 453 Mich 619 (1996), that a directed verdict granted on the basis of an error of law is nevertheless an acquittal for purposes of double jeopardy.
>
> The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution bars further prosecution after a judgment of acquittal, whether based on a jury verdict of not guilty or a ruling by the court that insufficient evidence existed to convict. *United States v Scott*, 437 US 82, 91 (1978); *Sanabria v United States*, 437 US 54, 68-69 (1978); *United States v Martin Linen Supply Co*, 430 US 564, 570 (1977); *Fong Foo v United States*, 369 US 141, 143 (1962). That the trial court characterized its ruling as a directed verdict does not control its classification. *Scott*, *supra* at 96. "Rather, a defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged . . . .' " *Id*. at 97, quoting *Martin Linen*, *supra* at 571.
>
> In this case, as in *Nix*, *supra*, the trial court apparently granted a directed verdict on the basis of an erroneous legal ruling that defendant could not be convicted because he owed no legal duty to the victim. *Nix* improperly characterized such a ruling as a determination that insufficient evidence existed to support a conviction. Unlike *Smalis v Pennsylvania*, 476 US 140, 144, n 7 (1986), the trial court's error of law in this case did not involve an actual element of the crime. Rather, the trial court erroneously determined that the offense included an additional element—a duty. Because the trial court's legal determination did not involve an essential element of the offense charged, it did not necessarily constitute an acquittal for double jeopardy purposes. *United States v Maker*, 751 F2d 614, 622 (C A3, 1984).

the majority revives this palpable error, placing the trial court in the same quandary of operating without any governing standards in deciding plaintiffs' claims.[4]

The initial order contained an internal inconsistency because it vacated the Court of Appeals' opinion without offering any alternative analysis. All future actions in this case depend on an articulation of the standard for preconviction Sixth Amendment claims, which the initial order did not provide. Specifically, the governing standard for what constitutes effective assistance of counsel in this context is necessary for this case to properly proceed. In fact, the trial court conceded the lack of clarity in regard to whether the *Strickland v Washington*, 466 US 668 (1984), standard applies to plaintiffs' preconviction claims of inadequate representation. Transcript of motions for summary disposition and class certification, May 15, 2007, p 34. Further, the order the majority now reinstates has recently been cited as illustrating the "state of confusion created by the lack of a clear standard to which courts can look when adjudicating these types of systemic reform cases." Chiang, *Indigent defense invigorated: A uniform standard for adjudicating pre-conviction*

> For these reasons, I would grant the prosecution's application for leave to appeal.
>
> WEAVER, C.J., and MARKMAN, J. We concur with the statement of Justice CORRIGAN. [*Id*. (footnote omitted).] [The full text of the order, entered April 18, 2000, Docket No. 116458, was not published in the *Michigan Reports*, but was published at 612 NW2d 395—REPORTER.]

Chief Justice KELLY'S rationalizations for expediting the release of this order without my dissent are unpersuasive. The existence of jurisprudentially significant issues in this case does not distinguish it from the bulk of cases we decide to hear. Further, the age of this case and the time this case has been before this Court are not adequate reasons for treating this case differently when these characteristics are present in many of the cases we consider. In addition, these reasons simply do not explain why the majority felt compelled to suddenly expedite the release of the order when I acted in a timely fashion to prepare a dissenting statement.

[4] The cases cited by Chief Justice KELLY as instances where we affirmed only the result of the Court of Appeals do not justify the failure to articulate a governing standard here. Contrary to the order here, the orders in *Andres v Brown*, 482 Mich 985 (2008), and *Citizens Protecting Michigan's Constitution v Secretary of State*, 482 Mich 960 (2008), did not result in the continuation of those cases. Rather, in *Andres*, we affirmed the grant of summary disposition, while in *Citizens Protecting Michigan's Constitution*, we affirmed the rejection of an initiative petition.

Sixth Amendment claims, 19 Temp Pol & Civ Rts L R 443, 461 (2010).[5] Additionally, similar class action cases have generated conflicting opinions on the appropriate constitutional standards. See *Hurrell-Harring v State*, 15 NY3d 8, 22 (2010) (reversing the holding of the Appellate Division of the New York Supreme Court that the claims of a class of indigent defendants were not justiciable and reinstating the plaintiffs' complaint because it "contained[ed] numerous plain allegations that in specific cases counsel simply was not provided at critical stages of the proceedings"); *Platt v State*, 664 NE2d 357, 363 (Ind App, 1996) (affirming the dismissal of the claims of a class of indigent defendants challenging a county indigent defense system, concluding that the claims were not reviewable because "a violation of a Sixth Amendment right will arise only after a defendant has shown he was prejudiced by an unfair trial"); *Kennedy v Carlson*, 544 NW2d 1, 8 (Minn, 1996) (reversing the decision of the district court granting the plaintiff public defender summary disposition, concluding that the plaintiff had failed to show an injury-in-fact because his claims of constitutional violations were "too speculative and hypothetical" where there was no evidence of inadequate assistance in any particular case or that the plaintiff "faced professional liability as a result of his office's substandard services"); *Luckey v Harris*, 896 F2d 479, 480 (CA 11, 1989) (Edmonson, J., dissenting) (criticizing the panel's holding that " 'deficiencies that do not meet the "ineffectiveness" standard may nonetheless violate a defendant's rights under the sixth amendment' " as "inconsistent with the language and rationale of both *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 [1984], and *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 [1984]").

Yet the majority permits this case to continue without providing any guidance to the trial court and the litigants concerning the legal standards that will govern discovery or subsequent motions. In particu-

---

[5] The article discussed the order the majority now reinstates as follows:

> Meanwhile, the Michigan Supreme Court similarly permitted plaintiffs' suit to proceed but issued only a two paragraph order noting that it was affirming "the result only of the Court of Appeals majority for different reasons. This case is at its earliest stages and, based solely on the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues." Many of the remaining cases filed since [*Platt v State*, 664 NE2d 357 (Ind App, 1996)] and prior to [*Hurrell-Harring v State*, 15 NY3d 8 (2010)] and Duncan have proven at least partially successful, resulting either in judicially mandated reform or in settlement agreements designed to reform the public defense system in question. Unfortunately, as evidenced by the murky opinions issued in Hurrell-Harring and Duncan many of the positive decisions lack clarity as to the standard to which plaintiffs are held, decreasing their precedential value for successive litigants and courts. [Chiang, 19 Temp Pol & Civ Rts L R at 462 (citation omitted).]

lar, the class certification question is inextricably intertwined with the issue of what is the proper standard for evaluating systemic preconviction claims of ineffective assistance of counsel. Determining how many have or will suffer actual injury hinges entirely on what constitutes this type of injury; what type of proofs are necessary to show harm; and whether the putative plaintiffs are adequate class representatives. Thus, without a standard to form the basis for the class action analysis under *Henry*, it appears the trial court cannot properly make any determination under *Henry*. Moreover, plaintiffs' motion for reconsideration has not presented anything that changes my view of these problems with the initial order. The majority simply brushes these problems aside by reinstating the initial order. I would deny plaintiffs' motion for reconsideration.

YOUNG and MARKMAN, JJ., joined the statement of CORRIGAN, J.

MARKMAN, J. (*dissenting*). I dissent from the order granting plaintiffs' motion for reconsideration, vacating this Court's July 16, 2010, order, and reinstating this Court's April 30, 2010, order. The July 16 order vacated the April 30 order and held that "[t]he defendants are entitled to summary disposition because, as the Court of Appeals dissenting opinion recognized, the plaintiffs' claims are not justiciable." In a concurring statement, I explained that our April 30 order was erroneous for two reasons:

> First, as defendants observe, this order vacated the Court of Appeals' opinion without articulating any governing standards. Second, it is not premature to decide this case because the precise issue presented is whether plaintiffs have stated a claim on which relief can be granted, and this, as well as the threshold justiciability issues, can be determined on the face of the complaint. [*Duncan v Michigan*, 486 Mich 1071 (2010) (MARKMAN, J., concurring).]

In addition, I concluded that defendants are entitled to summary disposition for the following reasons set forth in the Court of Appeals dissent:

> (1) The United States Supreme Court in *Gideon v Wainwright*, 372 US 335 (1963), and *Strickland v Washington*, 466 US 668 (1984), "was concerned with results, not process. It did not presume to tell the states *how* to ensure that indigent criminal defendants receive effective assistance of counsel." *Duncan v Michigan*, 284 Mich App 246, 357 (2009) (WHITBECK, J., dissenting).
>
> (2) Plaintiffs' claims would have "the judiciary override the Michigan system of local control and funding of legal services for indigent criminal defendants," despite the absence here of any constitutional violation. *Id*. at 358.
>
> (3) Plaintiffs' claims are not sufficient to create a presumption of either prejudice, or prejudice per se, that would warrant either declaratory or injunctive relief. *Id*. at 361.

(4) Plaintiffs lack standing, and, therefore, their claims are not justiciable. *Id*. at 371.

(5) Plaintiffs' claims are not ripe for adjudication, and, therefore, their claims are not justiciable. *Id*. at 371, 376.

(6) Plaintiffs' claims are not justiciable and, therefore, the relief they seek should not be granted. *Id*. at 385.

(7) In finding a justiciable controversy, the Court of Appeals erred in adopting a number of assumptions that are conjectural and hypothetical, including assumptions that plaintiffs and the class they purport to represent will be convicted of the crimes with which they are charged, that such convictions will result from prejudice stemming from ineffective assistance of counsel, that such ineffective assistance will be attributable to the inaction of defendants, and that trial and appellate judges will be unable or unwilling to afford relief for such violations of the Sixth Amendment. *Id*. at 368-370.

(8) There is no constitutional precedent that "guarantees an indigent defendant a particular attorney" or an "attorney of a particular level of skill" [as long as the attorney is not "so deficient as to cause prejudice"]; that requires that a "predetermined amount of outside resources be available to an attorney"; or that requires that there be a "meaningful relationship with counsel." *Id*. at 370[, 384].

(9) The Court of Appeals' assertions that affording plaintiffs injunctive relief "could potentially entail a cessation of criminal prosecutions against indigent defendants," *id*. at 273 (majority opinion), and "that nothing in this opinion should be read as foreclosing entry of an order granting the type of relief so vigorously challenged by defendants," *id*. at 281, accurately describe the potential consequences of its opinion, which consequences would constitute an altogether unwarranted and improper response to plaintiffs' claims. *Id*. at 380-385 (WHITBECK, J., dissenting).

(10) The Court of Appeals has "issued an open invitation to the trial court to assume ongoing operational control over the systems for providing defense counsel to indigent criminal defendants in Berrien, Genesee, and Muskegon counties." *Id*. at 383. And with that invitation comes a "blank check" on the part of the judiciary to "force sufficient state level legislative appropriations and executive branch acquiescence" in assuming similar control over the systems in every county in this state, while "nullify[ing] the provisions" of the criminal defense act and "superseding the authority of the Supreme Court and the State Court Administrator." *Id*. at 383-384. [*Id*. at 1072.]

Because plaintiffs have not presented anything in the present motion for reconsideration that causes me to believe that the above reasons do not continue to justify our decision to reverse the Court of Appeals, I would deny plaintiffs' motion for reconsideration.

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

Leave to Appeal Denied November 30, 2010:

HORVATH v JOHNSON, Nos. 139996 and 139997; Court of Appeals Nos. 283931 and 284842.

CORRIGAN, J. (*dissenting*). I would reverse the judgment of the Court of Appeals and remand for entry of judgment for defendants. By denying leave to appeal, the Court declines to correct the distortion of a statute that requires notice of lawsuits, threatening the fiscal viability of taxpayer-funded transportation authorities that serve our state's citizens.

MCL 124.419 requires written notice of a tort claim within 60 days of the occurrence. Because plaintiff did not provide a timely notice, his case should be dismissed. But rather than apply this straightforward law, the lower courts transformed plaintiff's application for first-party *no-fault* benefits into a fictitious notice of a separate *fault*-based lawsuit. As a result, publicly funded transportation authorities in Michigan serving millions of passengers a year now must anticipate a *fault*-based lawsuit every time they receive a *no-fault* claim. Scarce public funds will now go to investigating every routine no-fault case where a passenger slips, trips, falls, or bumps himself on or near a public bus to determine if the agency should reserve funds for a separate *fault*-based lawsuit. Michigan taxpayers will ultimately pay the price for this new upside-down world of "no-fault means fault."

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

Plaintiff caught his left foot in a closing bus door. He applied for first-party no-fault benefits with defendant's claims administrator within 60 days of the occurrence. More than 60 days after the occurrence, plaintiff's attorney sent a letter to the claims administrator saying that he was investigating the accident, but the letter did not assert a tort claim. The first notice of a tort claim came when plaintiff filed this lawsuit against the bus driver and the transportation agency, the Suburban Mobility Authority For Regional Transportation (SMART), nearly six months after his injury.

Defendants sought summary disposition for lack of the notice required by MCL 124.419. The trial court denied the motion, opining that plaintiff's no-fault application was a timely notice of his tort claim. The Court of Appeals affirmed,[1] stating:

> [The language of MCL 124.419] clearly does not delineate between notice of a claim for first-party no-fault benefits and notice of a third-party tort claim. As stated above, MCL 124.419 requires, quite simply "written notice[.]" Furthermore, our holding is consistent with the purpose of the notice provision in MCL 124.419, which, based on the language of the statute itself, is to

[1] Unpublished opinion per curiam, issued August 18, 2009 (Docket Nos. 283931 and 284842), p 5.

> apprise a common carrier that a claim is being asserted against it based upon injuries to a person or property. Plaintiff's application for no-fault benefits provided the date, time and location of the accident and described the accident, plaintiff's fall and the injuries plaintiff sustained in the fall. While the application for no-fault benefits did not specifically mention a third-party tort claim, such specific notice is not required by the plain language of MCL 124.419, and the information contained in plaintiff's application for first-party no-fault benefits was sufficient to apprise defendants that a claim was being asserted against them based upon injuries plaintiff sustained when [the bus driver] closed the bus door on plaintiff's left foot. The trial court properly concluded that the application for first-party no-fault benefits that plaintiff submitted to defendant SMART's claims administrator satisfied the notice provision in MCL 124.419.

Defendants applied for leave to appeal in this Court. We heard oral argument on the application.

II. ANALYSIS

Plaintiff failed to file the statutorily required written notice within 60 days of the occurrence. His timely application for first-party no-fault benefits was not a written notice of his third-party tort claim.

MCL 124.419 states:

> All claims that may arise in connection with the transportation authority shall be presented as ordinary claims against a common carrier of passengers for hire: *Provided, That written notice of any claim based upon injury to persons or property shall be served upon the authority no later than 60 days from the occurrence through which such injury is sustained* and the disposition thereof shall rest in the discretion of the authority and all claims that may be allowed and final judgment obtained shall be liquidated from funds of the authority: Provided, further, That only the courts situated in the counties in which the authority principally carries on its function are the proper counties in which to commence and try action against the authority. [Emphasis added.]

The meaning of this provision is clear: a plaintiff must serve "written notice of any claim" on the authority within 60 days of the occurrence giving rise to the injury. Plaintiff did not serve a written notice of his tort claim within 60 days. Summary disposition for defendants is thus proper.

The lower courts essentially rewrote the statutory text to say that notice of *any* claim provides notice of *any other* claim. That is not what the statute says. It requires "written notice of any claim." That is, a plaintiff must give the authority, within 60 days, written notice of any claim that the plaintiff intends to pursue. The statute does *not* say that written notice of one claim suffices to provide notice of any other claim

the plaintiff might assert. Thus, an application for first-party no-fault benefits does not give notice of a third-party tort claim.

Nor does the statute say that notice of the occurrence is good enough; it requires written notice *of the claim itself*. A "claim" is "a demand for something as due; an assertion of a right or an alleged right." *Random House Webster's College Dictionary* (2000). A claim is not merely an occurrence; it is a demand for payment that the plaintiff thinks is due as a result of that occurrence.

Quite simply, plaintiff's application for no-fault benefits was not a demand for payment of a third-party tort claim. The application did not demand payment for a tort claim or assert any right or alleged right to such payment. The application merely described the incident and injuries and sought payment of first-party benefits under Michigan's no-fault insurance law. Such an application does not assert rights or demand payment under fault-based tort law, nor does it allege the elements necessary to make out a tort claim.

Nonetheless, the decision here means that a Michigan transportation authority now must plan for a possible *fault-based* lawsuit every time it receives a *no-fault* application. What are the practical financial consequences to our publicly funded transportation system? In fiscal 2009, SMART buses drove over 16 million miles with nearly 13 million riders. With this volume of service, mishaps and injuries inevitably occur. Our no-fault system was designed to compensate injured persons while minimizing litigation costs. But now, every application for no-fault benefits sent to a transportation authority opens up a new universe of fault-based investigations. An authority must figure out, at taxpayer expense, (1) what happened, (2) who, if anyone, is at fault under governing legal standards, and (3) whether any injuries exceed the no-fault threshold.

Although most no-fault claims may not result in fault-based litigation, these additional fault-based investigations will now be necessary in our new pretend, "no-fault means fault" world. That is because a transportation authority will not know how much money to reserve for impending lawsuits without determining whether each no-fault application it receives is likely to become a judicially transmogrified notice of a fault claim that was not asserted in the real world.

Accordingly, I would reverse the judgment of the Court of Appeals and remand for entry of judgment for defendants. The plain language of MCL 124.419 requires written notice of "any claim" within 60 days. Because plaintiff did not provide written notice of his third-party tort claim within 60 days, this case should be dismissed for lack of notice.

MARKMAN, J., joined the statement of CORRIGAN, J.

MARKMAN, J. (*dissenting*). Although I appreciate that the notice provision at issue may sometimes require a plaintiff to draw a difficult legal distinction, I nonetheless agree with the analysis set forth by Justice CORRIGAN, and therefore join her dissent. Not only does her dissent give proper effect to the language of the statute, but it also makes clear the inevitable costs to taxpayers of the majority's interpretation. The notice provision would better have been drafted to apprise ordinary persons more clearly of their obligations under the law. Nonetheless, as Justice

CORRIGAN demonstrates, the provision is sufficiently clear as to what is required, and further relief should properly come from the legislature, not from this Court through allowing the misconstruction of statutory language.

Summary Disposition December 1, 2010:

NECI v STEEL, No. 137970; Court of Appeals No. 277069. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgments of the Court of Appeals and the Wayne Circuit Court, and we remand this case to the trial court for reconsideration in light of *McCormick v Carrier*, 487 Mich 180 (2010).

YOUNG, J. (*concurring*). I reluctantly concur in this Court's order remanding this case for reconsideration in light of this Court's recent decision in *McCormick v Carrier*, 487 Mich 180 (2010). Although I joined and continue to subscribe to Justice MARKMAN's dissenting opinion in that case, *McCormick* now controls when a person may recover in tort for noneconomic loss under the no fault act. The *McCormick* dissent astutely noted that

> [b]y nullifying the legislative compromise that was struck when the no-fault act was adopted—a compromise grounded in concerns over excessive litigation, the over-compensation of minor injuries, and the availability of affordable insurance—the Court's decision today will restore a legal environment in which each of these hazards reappears and threatens the continued fiscal soundness of our no-fault system. [*Id*. at 286-287 (MARKMAN, J., dissenting).]

One could probably not design a factual scenario that illustrates the embodiment of these concerns better than the facts presented in this case.

Plaintiff here is a child who broke her non-dominant arm when she was involved in an automobile accident. She was limited in activities that one would normally expect would be restricted during the normal healing process and timeframe—about three months. Specifically, plaintiff apparently could not carry her backpack to school, could not help her mother with household chores, and received attendant care for a portion of the time injured to assist with normal daily activities, such as dressing, bathing, and feeding. Additionally, plaintiff *self-limited* herself from playing recreational sports during recess and decided not to go to school on occasion even though her doctor placed no such limitations on her activities.

Quite simply, if this injury is deemed a "serious impairment of body function" for the purposes of recovery under the no-fault act—the type of impairment that was legislatively grouped with "death" and "permanent serious disfigurement"—it is difficult to imagine what injury would *not* qualify for noneconomic compensation under this Court's new *McCormick* standard. Children often break bones and their activities are appropriately reduced to account for their temporary injuries. The injury here and the corresponding limitations imposed upon plaintiff are so

*un*extraordinary that it simply cannot be said that plaintiff suffered a "serious impairment" or that her general ability to lead a normal life was affected in this case.

Unfortunately, the majority's decision in *McCormick* to strip MCL 500.3135 of any meaningful limitation by removing the statutory limitations imposed by the Legislature produces a situation of seemingly unlimited liability that will require courts to wrestle with the question of what constitutes a "serious impairment of body function" without meaningful and defined guidance from their state's senior Court. This case thus brings to life the concern noted by Justice MARKMAN in his *McCormick* dissent that "I am not sure that the majority's new threshold can even be called a 'threshold' when it can be satisfied in virtually every automobile accident case that results in injury." *Id*. at 256. I believe without question that plaintiff here cannot validly claim to have been seriously impaired in any relevant aspect of her life. Nevertheless, because *McCormick* now governs the analysis to this question, I feel compelled to allow the trial court to address this question anew.

CORRIGAN and MARKMAN, JJ., joined the statement of YOUNG, J.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

WIEDYK v POISSON, No. 138260; Court of Appeals No. 280214. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgments of the Court of Appeals and the Midland Circuit Court, and we remand this case to the trial court for reconsideration in light of *McCormick v Carrier*, 487 Mich 180 (2010).

YOUNG, J. (*concurring*). I reluctantly concur in this Court's order remanding this case for reconsideration in light of this Court's recent decision in *McCormick v Carrier*, 487 Mich 180 (2010). Although I joined and continue to subscribe to Justice MARKMAN's dissenting opinion in that case, *McCormick* now controls when a person may recover in tort for noneconomic loss under the no fault act. The *McCormick* dissent astutely noted that

> [b]y nullifying the legislative compromise that was struck when the no-fault act was adopted—a compromise grounded in concerns over excessive litigation, the over-compensation of minor injuries, and the availability of affordable insurance—the Court's decision today will restore a legal environment in which each of these hazards reappears and threatens the continued fiscal soundness of our no-fault system. [*Id*. at 286-287 (MARKMAN, J., dissenting).]

The factual scenario presented in this case certainly brings to life these concerns and thus illustrates what is so troubling with the virtually standardless positions articulated in *McCormick*.

In this case, prior to the most current accident for which plaintiff is seeking noneconomic damages (which occurred in 2005), plaintiff had been involved in 10 prior accidents in the past 15 years, and those accidents occurred after he suffered a closed head injury at work

rendering him disabled since 1979. As a result, plaintiff had serious medical injuries and ailments that rendered him seriously impaired for quite some time *before* the present accident. The trial court specifically found that the medical records made clear that previous events caused the ailments from which he suffered, and thus plaintiff's general ability to lead his normal life was not affected by the accident in question here. Because this determination is a person- and fact-specific inquiry, courts must recognize that plaintiff's pre-accident lifestyle was sedentary and his activities were highly restricted; this did not change after the 2005 accident. Thus, there is no *causation* between the 2005 accident and plaintiff's impairments because he was already seriously impaired prior to this accident as a result of many other prior accidents, as even one of plaintiff's own physicians conceded. Plaintiff's inability to show causation does not change even on remand for consideration in light of *McCormick*.

Nevertheless, because *McCormick* now governs the legal analysis that must be employed when addressing these issues, I feel compelled to allow the trial court to address this question anew. The majority's decision in *McCormick* to strip MCL 500.3135 of any meaningful limitation by removing the statutory limitations imposed by the Legislature produces a situation of seemingly unlimited liability that will require courts to wrestle with the question of what constitutes a "serious impairment of body function" without meaningful and defined guidance from their state's senior Court.

CORRIGAN and MARKMAN, JJ., joined the statement of YOUNG, J.

YURSCO v SWANSON, No. 140927; Court of Appeals No. 289227. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgments of the Court of Appeals and the Saginaw Circuit Court, and we remand this case to the trial court for reconsideration in light of *McCormick v Carrier*, 487 Mich 180 (2010).

YOUNG, J. (*concurring*). I reluctantly concur in this Court's order remanding this case for reconsideration in light of this Court's recent decision in *McCormick v Carrier*, 487 Mich 180 (2010). Although I joined and continue to subscribe to Justice MARKMAN's dissenting opinion in that case, *McCormick* now controls when a person may recover in tort for noneconomic loss under the no fault act. The *McCormick* dissent astutely noted that

> [b]y nullifying the legislative compromise that was struck when the no-fault act was adopted—a compromise grounded in concerns over excessive litigation, the over-compensation of minor injuries, and the availability of affordable insurance—the Court's decision today will restore a legal environment in which each of these hazards reappears and threatens the continued fiscal soundness of our no-fault system." [*Id.* at 286-287 (MARKMAN, J., dissenting).]

The factual scenario presented in this case certainly brings to life these concerns and thus illustrates what is so troubling with the virtually standardless positions articulated in *McCormick*.

Plaintiff here sustained a fracture in his left shoulder as a result of a motorcycle accident. Within approximately two months plaintiff returned to work without restrictions, and shortly thereafter he self-discharged from physical therapy. The trial court specifically found that plaintiff could not identify any recreational activities that he has been unable to perform as a result of the accident, and that any residual effects from the accident "have not deterred him from performing any vocational, domestic or recreational activity which he engaged in prior to the accident." Indeed, except for work, plaintiff was able to resume his normal daily activities almost immediately (five days) after the accident.

Plaintiff's injury here is *not* "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." Indeed, the trial court's *findings of fact*—which do not change even upon remand for consideration under *McCormick's* new legal standard—expressly state that plaintiff's ability to live in his normal manner of living has not been affected, nor has there been an impairment of plaintiff's pre-accident activity or lifestyle. The injury here was simply not sufficient to meet the statute's definition of "*serious* impairment of body function"—the type of impairment that was legislatively grouped with "death" and "permanent serious disfigurement."

Unfortunately, the majority's decision in *McCormick* to strip MCL 500.3135 of any meaningful limitation by removing the statutory limitations imposed by the Legislature produces a situation of seemingly unlimited liability that will require courts to wrestle with the question of what constitutes a "serious impairment of body function" without meaningful and defined guidance from their state's senior Court. This case thus brings to life the concern noted by Justice MARKMAN in his *McCormick* dissent that "I am not sure that the majority's new threshold can even be called a 'threshold' when it can be satisfied in virtually every automobile accident case that results in injury." *Id*. at 256. Nevertheless, because *McCormick* now governs the analysis to this question, I feel compelled to allow the trial court to address this question anew.

CORRIGAN and MARKMAN, JJ., joined the statement of YOUNG, J.

JSB ENTERPRISES V AWRY ENTERPRISES, INCORPORATED, No. 141170; Court of Appeals No. 288981. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, we vacate the default judgment of the Oakland Circuit Court as it pertains to defendant Pro-Mark, we reverse the circuit court's order denying the motion to set aside the default as it pertains to defendant Pro-Mark, and we remand this case to the circuit court for further proceedings. The record at the time the default was entered did not support a default against defendant Pro-Mark. That defendant was not served and the complaint did not show a relationship between that defendant and the one defendant that was served for purposes of service of process. The motion to strike an exhibit is granted, but the related request for damages is denied.

MICHIGAN AFSCME COUNCIL 25 V WOODHAVEN-BROWNSTOWN SCHOOL DISTRICT, No. 141732; Court of Appeals No. 299945. Pursuant to MCR

7.302(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to the Court of Appeals for expedited plenary consideration. We do not retain jurisdiction.

KELLY, C.J. (*concurring*). I concur in the order vacating the Court of Appeals' order and remanding the case to the Court of Appeals for expedited plenary consideration. I write separately in response to the dissenting statement.

Defendant school district faced a $4 million budget deficit and sought to negotiate with plaintiff, a union representing non-instructional school employees, to obtain concessions to remedy that deficit. When negotiations proved unsuccessful, defendant notified plaintiff that it would issue requests for proposals seeking bids from private contractors. Plaintiff filed an unfair labor practice charge with the Michigan Employment Relations Commission, claiming that it had not been given an opportunity to bid on an equal basis, as required by the public employee relations act (PERA), MCL 423.215(3)(f). That charge remains pending and is scheduled for a hearing on December 2, 2010.

Meanwhile, plaintiff also sought an injunction in circuit court prohibiting defendant from terminating its members' employment pending resolution of its charge that defendant violated PERA. The circuit court granted an injunction, concluding that (1) plaintiff was likely to succeed on the merits, (2) plaintiff had shown irreparable harm, and (3) the harm to plaintiff and its members outweighed the harm of an injunction to defendant.

Defendant filed an emergency application for leave to appeal and a motion for immediate consideration in the Court of Appeals. It claimed that the circuit court's injunction was costing it $4,360 per day, the difference between the winning bid and what defendant would have otherwise paid plaintiff under the collective bargaining agreement. The Court of Appeals reversed the circuit court's grant of injunctive relief in a peremptory order. It noted that plaintiff's members could be made whole by legal remedies and that plaintiff had not shown irreparable harm as required for injunctive relief. Judge FORT HOOD issued a separate statement indicating that she would have offered the parties a full opportunity to be heard on the merits. Plaintiff subsequently filed an emergency application for leave to appeal in this Court.

Plaintiff argues that the Court of Appeals erred by reversing the circuit court's award of an injunction and that it failed to properly apply the abuse of discretion standard of review. It is obvious that the Court of Appeals gave short shrift to the complex facts and arguments of the parties. Absent a thorough opinion from the Court of Appeals, it is simply impossible for this Court to determine whether that court properly considered all of the relevant background information and evidence. Such consideration is especially important in a case involving the standard of proof necessary to obtain injunctive relief.

Furthermore, the Court of Appeals appears not to have properly applied the governing standard of review. The grant of an injunction is

reviewed for an abuse of discretion.[1] Such an abuse occurs when the trial court selects an outcome that is not within the range of reasonable and principled outcomes.[2] The Court of Appeals peremptory order makes findings of fact where it should provide substantive review of the circuit court's findings. Moreover, its conclusory analysis cannot withstand appellate scrutiny.

Finally, plaintiff raises a persuasive argument in reliance on this Court's opinion in *Mich State Employees Ass'n v Dep't of Mental Health*.[3] There, we opined that the loss of health insurance benefits may be adequate to show an irreparable harm sufficient to warrant injunctive relief. Although we questioned this statement in *Pontiac Fire Fighters Union Local 376 v City of Pontiac*,[4] it remains persuasive authority and will so remain until the Court rules to the contrary. Additionally, the Court of Appeals failed to follow the mandate that an alleged injury must be evaluated in light of the totality of the circumstances.[5]

In sum, the Court of Appeals applied an improper standard of review, made findings of fact, and failed to adequately analyze the issues presented. Accordingly, I concur in the order vacating the Court of Appeals' order and remanding the case for expedited plenary consideration.

CORRIGAN, J. (*dissenting*). I would deny leave to appeal. The Court of Appeals correctly concluded that plaintiff has failed to establish an irreparable injury warranting a preliminary injunction. By vacating the Court of Appeals' peremptory order and remanding for plenary consideration, the majority forces a financially struggling school district to incur ongoing costs of nearly $5,000 a day to pay for public employees that it cannot afford.

Facing a $4 million budget deficit, defendant Woodhaven-Brownstown School District sought to negotiate with plaintiff, a union representing non-instructional school employees, to obtain concessions to address the shortfall. When those negotiations failed, defendant notified plaintiff that it would seek bids from private contractors, as permitted under the public employee relations act, MCL 423.215(3)(f), and the collective bargaining agreement (CBA). Defendant invited plaintiff to submit a bid and eventually agreed to waive conditions that plaintiff claimed it could not meet, but plaintiff never submitted a bid. Defendant's school board then voted to award the contracts for transportation and custodial

---

[1] *Holly Twp v Dep't of Natural Resources*, 440 Mich 891 (1992) ("The granting of injunctive relief is within the sound discretion of the trial court, although the decision must not be arbitrary and must be based on the facts of the particular case.").

[2] *Edry v Adelman*, 486 Mich 634, 639 (2010).

[3] *Mich State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 167 n 10 (1984) (*MSEA*).

[4] *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 10 n 20 (2008).

[5] *MSEA*, 421 Mich at 167.

services to private companies, which was expected to save the school district over $5 million during the first three years.

Plaintiff filed an unfair labor practice charge with the Michigan Employment Relations Commission (MERC), arguing that it was not given an opportunity to bid on an equal basis. That charge remains pending and is scheduled for a hearing in December. Plaintiff also sought an injunction in circuit court to prohibit defendant from terminating its members' employment pending resolution of the MERC proceedings. The circuit court granted the injunction. Defendant filed an emergency appeal, asserting that the circuit court order was costing it $4,630 a day, the difference between the winning bid and the amount defendant would have to pay for the same services under the CBA. In a peremptory order, the Court of Appeals reversed the grant of injunctive relief because plaintiff had not shown irreparable harm given the remedies available in the MERC proceeding. The order was given immediate effect. One judge separately stated that she would not decide the matter peremptorily.

The majority now vacates the Court of Appeals' peremptory order and remands for plenary review, thereby subjecting defendant's school district to ongoing costs of $4,630 a day until this matter is resolved. Yet the majority identifies no reason to believe that the Court of Appeals erred in concluding that plaintiff has not established an irreparable injury warranting a preliminary injunction.

The party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9 (2008). "[A] particularized showing of irreparable harm . . . is . . . an indispensable requirement to obtain a preliminary injunction. The mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Id.* (quotation marks and citation omitted). " '[I]t is basically contrary to public policy in this State to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace.' " *Id.* at 8, quoting *Holland School Dist v Holland Ed Ass'n*, 380 Mich 314, 326 (1968). Moreover, a preliminary injunction should not issue where an adequate legal remedy exists. *Pontiac Fire Fighters*, 482 Mich at 8.

Here, the Court of Appeals reasoned that if plaintiff should prevail in its unfair labor practice charge, remedies are available in the MERC proceeding to make plaintiff's members whole, including reinstatement, back pay, and other remedies. Moreover, plaintiff may pursue collective bargaining with the school district following any reinstatement. The Court of Appeals decision is supported by our analysis in *Pontiac Fire Fighters*, 482 Mich at 10 ("If the layoffs violated the CBA or constituted an unfair labor practice, MERC or a grievance arbitrator can award back pay, order reinstatement, or provide another remedy to make the laid-off firefighters whole.").

Plaintiff's contention that its members will suffer irreparable harm by losing health insurance coverage is not supported by a particularized showing of injury to any individual employee. Plaintiff has submitted no evidence that any laid-off employee will suffer a loss of treatment for any medical condition. If the loss of health insurance *by itself, without any particularized evidence of how individual employees will be affected*, is

sufficient to establish irreparable harm, then every layoff of a public employee in Michigan will result in irreparable harm. Financially strapped governmental agencies will then be required by court order to keep paying salaries and benefits to public employees who have been laid off for budgetary reasons. In such an unprecedented new regime of court-mandated public employment, how will our governmental agencies avoid budgetary shortfalls given the current economic climate?

In its order today, the majority (1) vacates a Court of Appeals decision that is fully supported by our precedent and (2) forces a financially struggling school district to pay, by court order, nearly $5,000 a day for public employees that it cannot afford. Because the Court of Appeals did not err, I would deny leave to appeal.

MARKMAN, J., joined the statement of CORRIGAN, J.

Leave to Appeal Denied December 1, 2010:

PEOPLE v ACEVAL, No. 138577; reported below: 282 Mich App 379.

MARKMAN, J. (*dissenting*). I respectfully dissent. This case is singular and, hopefully, will remain as much. It is an extraordinary "case without precedent and very likely without duplicate hereafter," *People v Smith*, 405 Mich 418, 436 (1979), in which the prosecutor, the judge, and the police, were each involved in enabling perjured testimony. As the Court of Appeals observed, their conduct was "disgraceful," "plainly reprehensible," and "opprobrious." At the end of this deeply flawed trial, the jury was unable to reach a verdict and the judge declared a mistrial. Over defendant's objection, a second trial began and defendant eventually pled guilty.

I am of the view that the jury—which could not reach a verdict of guilty even absent an awareness of the tainted evidence—would almost certainly have found it to be of significance as to the credibility of the principal witness against defendant that the witness had been promised, upon defendant's conviction, 10 percent of the expected forfeiture proceeds, an amount estimated to be as much as $100,000. Had the jury been made aware of this evidence, as it should have been, there is a reasonable chance that defendant would have been acquitted, which acquittal under the United States and Michigan Constitutions would have barred a second trial.

I am further of the view that had it become known during trial that (a) the principal witness testified falsely concerning this interest; (b) that such testimony was known to be false by both the prosecutor and the judge; and (c) that the prosecutor and the judge colluded in allowing such false testimony, a mistrial almost certainly would have been required on account of such misconduct. And such a mistrial—one occasioned by circumstances directly "attributable to prosecutorial [and] judicial overreaching"—would almost certainly have deprived the prosecutor, under either the Due Process Clause or the Double Jeopardy Clause of the United States and Michigan Constitutions, of a second opportunity to try the defendant. *United States v Dinitz*, 424 US 600, 607 (1976). That such circumstances did not come to light until after the trial, and that the state therefore was able to try defendant a second time "cannot make an

unconstitutional second trial retrospectively valid." *People v Lett*, 466 Mich 206, 229 (2002) (CAVANAGH, J., dissenting).

Because defendant's trial neither entailed a search for the truth nor adhered to constitutional first principles of fair procedure, I would reverse the Court of Appeals, vacate defendant's conviction, and hope never again to see such a case within our criminal justice system.

HATHAWAY, J. (*dissenting*). I would grant leave to appeal in this matter because the issues before us are significant and worthy of full Court review before this Court renders its decision.

CORRIGAN, J., stated as follows: I am not participating because I may be a witness in a related case.

ABAY v DAIMLERCHRYSLER INSURANCE COMPANY, No. 139725; Court of Appeals No. 283624. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of March 24, 2010. The application for leave to appeal the August 13, 2009 judgment of the Court of Appeals is denied.

KELLY, C.J., and DAVIS, J., would reverse the Court of Appeals' decision for the reasons stated in the Court of Appeals dissenting opinion.

HATHAWAY, J., would reverse the judgment of the Court of Appeals.

PRAY v BAYBEST RIBS, LLC, No. 141002; Court of Appeals No. 286672.

MARKMAN, J. (*dissenting*). On a February day, plaintiff, a lifelong resident of Michigan, fell on ice in defendant's parking lot. Although the parking lot had been cleared of most snow, there were six inches of snow on the ground elsewhere, it having snowed nearly an inch earlier in the day and nearly two inches the day before, and the high temperature that day being 15 degrees. The trial court granted defendant's motion for summary disposition, concluding that the ice was "open and obvious," and the Court of Appeals reversed.

I agree with the trial court that, given the wintry conditions that existed at the time of plaintiff's fall, the potential for the parking lot to be icy should have been well understood by plaintiff. The Court of Appeals held that because it stopped snowing by 11:00 a.m., and because plaintiff did not fall until 3:30 p.m., plaintiff had no reason to know that the parking lot would be icy. I strongly disagree. A lifelong resident of Michigan (or, indeed, a lifelong resident of any other state, province, or country standing even a roughly equivalent distance from the equator) should be well aware that when it snows, and when temperatures are below freezing, ice may form on parking lots, and that such ice may remain until temperatures rise above freezing. Because plaintiff should have known that the parking lot might be icy, the ice was fully "open and obvious."

I would reverse the Court of Appeals and reinstate the trial court's order granting defendant's motion for summary disposition.

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

GRIEVANCE ADMINISTRATOR v MUSILLI AND BAUMGARDNER, No. 142058.

Reconsideration Denied December 1, 2010:

PEOPLE v GEBORKOFF, No. 140924; Court of Appeals No. 288242. Leave to appeal denied at 487 Mich 856.

Appeal Dismissed on Stipulation December 1, 2010:

TUS v HURT, No. 139769; Court of Appeals No. 281007. Leave to appeal granted at 486 Mich 910.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered December 3, 2010:

FARMERS INSURANCE EXCHANGE v YOUNG, No. 141571; Court of Appeals No. 275584. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied December 3, 2010:

HERITAGE IN THE HILLS HOMEOWNERS ASSOCIATION v HERITAGE OF AUBURN HILLS LLC, No. 140956; Court of Appeals No. 286074.

KELLY, C.J., and HATHAWAY, J., would vacate part VI of the Court of Appeals' opinion concerning the trial court's holdings related to the individual owners and remand this case to the Court of Appeals for plenary consideration of plaintiff Luttermoser's arguments.

MAJORS v HOWELL, No. 141245; Court of Appeals No. 289972.

DUNN v MATATALL, No. 141316; Court of Appeals No. 291254.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v BERNARD, No. 141341; Court of Appeals No. 296334.

PEOPLE v JESSIE WALTON, No. 141413; Court of Appeals No. 291147.

PHELPS ESTATE v ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, No. 141425; Court of Appeals No. 289537.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v SHAD GIBSON, No. 141459; Court of Appeals No. 297417.

KELLY, C.J., would remand this case to the trial court for reconsideration of the scoring of offense variable 10.

RICHMOND TOWNSHIP v RONDIGO LLC ,Nos. 141462 and 141463; Court of Appeals Nos. 288625 and 290054.

HAWKINS v DEPARTMENT OF CORRECTIONS, No. 141467; Court of Appeals No. 293478.

KELLY, C.J., and HATHAWAY, J., would grant leave to appeal.

COLEMAN v APPLEBEE'S OF MICHIGAN, INCORPORATED, No. 141505; Court of Appeals No. 288878.

KELLY, C.J., and HATHAWAY, J., would grant leave to appeal.

JASTIFER v JASTIFER, No. 141532; Court of Appeals No. 291988.

PEOPLE v HUTTER, No. 141539; Court of Appeals No. 291140.

Reconsideration Denied December 3, 2010:

SCHOOLEY v CONSOLIDATED ROADHOUSE OF TAYLOR, LLC, No. 139294; Court of Appeals No. 291284. Leave to appeal denied at 486 Mich 918.

KELLY, C.J. (*concurring*). It is well-settled that "[a] denial of leave to appeal has no precedential value."[1] Thus, the dissent can be reassured, this order and our May 21, 2010, order denying leave to appeal do not constitute a "conclusion" on which the "imposition of strict liability upon a business" can be premised.[2]

It is undisputed in this case that defendant's toilet paper dispenser broke plaintiff's hand when she was using it in a normal manner while a patron in defendant's restaurant. It is also undisputed that checking whether the dispensers were in the "locked" position was not part of defendant's routine restroom inspections. Thus, if a jury concluded that the dispensers constituted a "dangerous condition," it could certainly conclude that defendant's inspections were insufficient to satisfy its duty to inspect the premises.

By denying reconsideration of our denial of leave to appeal, this Court has not decided whether plaintiff should recover damages from defendant. It has merely decided that the Court of Appeals and the trial court were correct in allowing the case to continue. As always, the burden will be on plaintiff at trial to show that her injury occurred because the dispenser represented an unreasonable risk of harm. As always, she will be required to show that defendant knew or should have known of the risk. It is not for this Court but rather for the jury to decide if the dispenser that harmed her constituted a dangerous condition.[3]

---

[1] *Tebo v Havlik*, 418 Mich 350, 363 n 2 (1984) (opinion by BRICKLEY, J.); *id.* at 371 n 2 (opinion by RYAN, J.); *id.* at 380 n 18 (opinion by LEVIN, J.).

[2] *Post* at 982-983.

[3] The dissent concludes that the hazard in this case could not have reasonably been anticipated as a matter of law. But that conclusion rests on speculation. There is no evidence that defendant's employees inspected its toilet paper dispensers to see if they were closed. In fact,

It would be improper for this Court to rule that an ordinary instrument like a toilet paper dispenser could never cause compensable harm for the mere reason that it is used in people's day-to-day lives. The dissenters would have us believe that great harm is done to the rule of law by our denial here. My belief is that the great harm would be for this Court to reverse both lower courts and alter settled law that holds that (1) "[t]he landowner has a duty of care, not only to warn the 'invitee' of any known dangers, but to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards,"[4] and (2) a lawsuit should not be dismissed on summary disposition where a genuine issue of material fact has been shown to exist. MCR 2.116(C)(10).

MARKMAN, J. (*dissenting*). I strongly dissent, and would grant defendant's motion for reconsideration, vacate this Court's May 21, 2010, order, and reverse the trial court's denial of defendant's summary disposition motion. I continue to believe that an ordinary toilet paper dispenser does not constitute a "dangerous condition" causing "an unreasonable risk of harm" on a business premises. *Lugo v Ameritech Corp*, 464 Mich 512, 516 (2001).

As already set forth in my statement dissenting from the denial of leave to appeal in this case, *Schooley v Consolidated Roadhouse of Taylor, LLC*, 486 Mich 918, 920 (2010), plaintiff alleges that, while she was using the restroom at defendant's restaurant, a plastic toilet paper dispenser fell open and injured her hand. The trial court denied defendant's motion for summary disposition, and the Court of Appeals and this Court denied defendant's applications for leave to appeal.

In its motion for reconsideration, defendant argues that if this Court's order is allowed to stand, there will be "no more negligence/premises liability law in the State of Michigan." While that assertion is perhaps slightly hyperbolic, it is hard to understand the actions of the majority as anything other than the imposition of strict liability upon a business for an accident occurring on its property. The law, at least as it has always previously existed, has never imposed such an obligation upon a premises owner. Rather, the law was clear that "[t]he duty a possessor of land owes his invitees is not absolute . . . it does not extend to conditions from which an unreasonable risk *cannot be anticipated*." *Williams v Cunningham Drug Stores*, 429 Mich 495, 500 (1988) (emphasis added). The law was clear that a plaintiff must show a "dangerous condition" that caused "an unreasonable risk of harm" that the landowner "knows or should know invitees will not discover, realize, or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609 (1995). Because a toilet

---

plaintiff argued before the trial court that defendant's restaurant manager conceded that the dispensers were not inspected even though he was aware that customers tampered with them. Thus, it is proper to leave the determination of the truth of the assertion to a jury, not to this Court.

[4] *Wymer v Holmes*, 429 Mich 66, 71 n 1 (1987), overruled on other grounds by *Neal v Wilkes*, 470 Mich 661 (2004).

paper dispenser hardly constitutes "a dangerous condition"; because a toilet paper dispenser does not create "an unreasonable risk of harm" that should be "anticipated"; because a toilet paper dispenser that may come open once every 3 to 4 years does not constitute "notice" of a dangerous condition; and because defendant here was at least ordinarily diligent in fulfilling its duty to inspect its premises and warn patrons of hazardous conditions, plaintiff cannot sustain her lawsuit.

Indeed, defendant satisfied the exact standard that the concurring justice invokes. Citing *Wymer v Holmes*, 429 Mich 66, 71 n 1 (1987), overruled on other grounds by *Neal v Wilkes*, 470 Mich 661 (2004), the concurrence correctly states that "[t]he landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards." The concurrence fails to acknowledge, however, that the defendant-restaurant here *did* inspect the premises—in fact, it inspected the restroom regularly at 15 to 30 minute intervals—and did not discover any hazards. Thus, how could it make any "necessary repairs" or "warn" its customers when there were no necessary repairs to make and there were no hazards of which to warn? There is no genuine issue of material fact on this question that would preclude summary disposition under MCR 2.116(C)(10).

The majority's contrary conclusion is inconsistent with the law of this state, which has always recognized that liability should not attach for ordinary conditions on property that persons must routinely negotiate in their day-to-day lives. If the toilet paper dispenser at issue here serves to impose liability on a landowner, the number of ordinary and innocuous things that will do the same is limitless. If the defendant restaurant's inspections in this case are insufficient to satisfy its duty, premise owners will be held to an effectively strict-liability standard, under which they must inspect their premises for "conditions from which [even] an unreasonable risk cannot be anticipated." *Williams*, 429 Mich at 500. Indeed, if I understand the concurring justice correctly, it was not enough for defendant to have inspected the restroom every 15 to 30 minutes for any hazards that *could* reasonably have been anticipated, such as wet floors. Nor was it enough for defendant to visually check that its toilet paper dispensers were in a proper position, excluding presumably those dispensers located in stalls being utilized at the time. Rather, defendant apparently also had a legal duty to inspect for hazards that *could not* reasonably have been anticipated, such as a toilet paper dispenser opening unexpectedly even when it appeared closed.

According to the concurring Chief Justice, "there is no evidence" that defendant's employees inspected its toilet paper dispensers, and any such conclusion "rests on speculation." I disagree. In my view, this conclusion is inescapable as it derives from a logical deduction from the uncontroverted evidence. The evidence established that defendant's employees inspected the restroom every 15 to 30 minutes. Common sense would seem to dictate that these employees had their eyes open when they performed the restroom inspections, and therefore that they would have seen if a toilet paper dispenser had been in an improper and "hazardous"

position. Such "speculation," in my judgment, does not require that this case must be relegated "to a jury," and cannot be decided as a matter of law.

In sum, if the majority continues to abide by the understanding of premises liability reflected in this case, the effect will be severely damaging upon even the most responsible business and private landowners in this state. As correctly observed by the defendant restaurant:

> When this Court [holds] that something as innocuous as a routine, toilet paper dispenser constitutes a "dangerous condition" causing an "unreasonable risk of harm," without any evidence that the defendant business created, knew, or should have known that such an ordinary device on its premises constituted such a danger, then any accident that occurs on the premises of a business establishment in this state becomes compensatory.

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

GRAVES v STATE FARM MUTUAL INSURANCE COMPANY, No. 140897; Court of Appeals No. 289822. Leave to appeal denied at 487 Mich 856.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

Leave to Appeal Denied December 7, 2010:

CALDERON v AUTO-OWNERS INSURANCE COMPANY, No. 138805; Court of Appeals No. 283313.

KELLY, C.J. (*concurring*). I concur in the Court's order denying Auto-Owners Insurance Company's application for leave to appeal. I write separately to respond to the dissent. It suggests that the issue of domicile should be decided as a matter of law because the facts "are not in dispute." However, material facts are in dispute.

Arthur Krumm, age 29, was severely injured when a car in which he was a passenger was involved in a single-car accident in North Carolina on May 16, 2003. Krumm had no automobile insurance, and the driver of the car was not insured under a Michigan no-fault policy. As a result of the accident, Krumm sustained traumatic brain injuries, and plaintiff, Krumm's sister, was appointed as his legal guardian. Krumm's condition apparently prevented him from giving a deposition or otherwise explaining where he was domiciled at the time of the accident.

Auto-Owners initially paid no-fault benefits arising from Krumm's injuries based on the theory that he was domiciled in Fife Lake, Michigan, with his grandmother, who had a no-fault policy with defendant.[1] However, it discontinued the benefits and asserted that Krumm was not entitled to them because he was not domiciled with his grandmother. Plaintiff sued Auto-Owners, seeking personal protection insur-

[1] MCL 500.3114(1) provides that a person with injuries arising from a motor vehicle accident may claim Michigan no-fault benefits under the policy of a spouse or relative domiciled in the same household.

ance benefits and underinsured motorist benefits under Krumm's grandmother's policy. The trial court granted Auto-Owners' motion for summary disposition, and the Court of Appeals reversed.

In concluding that the Court of Appeals erred in reversing the trial court's grant of summary disposition, the dissent focuses mainly on Krumm's domiciliary intent. However, additional factors must be weighed when determining a person's domicile for purposes of MCL 500.3114(1) including (1) the formality or informality of the relationship between the claimant and members of the insured's household, (2) whether the claimant lives in the same house, within the same curtilage, or on the same premises as the insured, (3) the existence or lack of another lodging for the claimant, (4) the claimant's mailing address, (5) whether the claimant maintains possessions at the insured's home, (6) whether the insured's address appears on the claimant's driver's license, (7) whether the claimant has a bedroom in the insured's home, and (8) whether the claimant is dependent on the insured for financial support. *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477, 496-97 (1979); *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675 (1983).

The facts pertinent to these factors add additional support to plaintiff's assertion that Krumm was domiciled with his grandmother in Michigan at the time of the accident. Plaintiff submitted evidence that (1) Krumm's grandmother's relationship to Krumm was actually that of a mother rather than grandmother; Krumm's grandmother adopted him when he was a young boy and raised him, (2) Krumm visited Arkansas only periodically and always returned to his grandmother's house in Michigan, (3) Krumm was estranged from his wife; he did not have a residence in Arkansas, but moved from place to place, living a transient lifestyle, (4) Krumm received mail at his grandmother's address in Michigan, (5) Krumm kept possessions at his grandmother's house, (6) Krumm did not have a driver's license in any state, but he had a Michigan identification card and a voter's registration card both listing his grandmother's address in Michigan, and (7) Krumm had his own bedroom in his grandmother's house.

By focusing on the first factor, Krumm's domiciliary intent, the dissent fails to consider the evidence that plaintiff presented in opposition to the motion for summary disposition. This ignores the standard of review a court must use when a defendant seeks summary disposition under MCR 2.116(C)(10). The court must review the evidence submitted by the parties in the light most favorable to the party opposing the motion. *West v Gen Motors Corp*, 469 Mich 177, 183 (2003). In this case, plaintiff presented material facts that created a genuine issue when opposing the summary disposition motion. The facts must be viewed in the light most favorable to plaintiff.

Moreover, the dissent also errs in its summary of the evidence involving plaintiff's intent. Because the accident incapacitated Krumm, he was unable to testify about where he was domiciled. Friends and family members gave deposition testimony regarding his domiciliary intent. It was conflicting. Some witnesses testified that plaintiff intended to remain in Arkansas, at least temporarily, and some testified that he intended to return to his grandmother's. As the Court of Appeals noted:

"There was no evidence presented that Krumm planned to remain in Arkansas permanently, but there was evidence presented from multiple sources that Krumm intended to move back to Michigan and verbally declared that intent." *Calderon v Auto-Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 24, 2009 (Docket No. 283313).

The totality of evidence, viewed in the light most favorable to plaintiff, may not prove that Krumm resided with his grandmother. However, it provides a basis for a reasonable jury to conclude that he was domiciled with her at the time of the accident. Given the conflicting evidence regarding domiciliary intent and considering the other *Workman-Dairyland* factors, a genuine issue of material fact exists about Krumm's domicile. It should be submitted to a jury. I agree with the Court of Appeals that summary disposition should not have been granted.

MARKMAN, J. (*dissenting*). I respectfully dissent from the order denying defendant's application. Under no circumstances, in my judgment, could it be fairly said that, at the time of the accident in this case, Arthur Krumm was "domiciled in the same household" as his grandmother in Michigan for purposes of personal protection insurance under our no-fault act. Accordingly, I would reverse the judgment of the Court of Appeals and remand to the trial court for reinstatement of its order granting summary disposition in favor of defendant.

Under Michigan's no-fault act, personal protection insurance benefits are available to "the person named in the policy, the person's spouse, and a relative of either domiciled in the same household . . . ." MCL 500.3114(1). "Domicile [is] that place where a person has voluntarily fixed his abode not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time." *Henry v Henry*, 362 Mich 85, 101-102 (1960) (citation omitted). "Generally, the determination of domicile is a question of fact. However, where . . . the underlying facts are not in dispute, domicile is a question of law for the court." *Fowler v Auto Club Ins Ass'n*, 254 Mich App 362, 364 (2002).

The facts here are not in dispute. Krumm, who was born and raised in Michigan by his grandmother, abandoned his ties to Michigan and moved to Arkansas in 2002 with his wife and children, where he lived and worked for 13 months prior to his accident. In each of his many encounters with Arkansas public safety authorities, Krumm identified himself as an Arkansas resident with an Arkansas address. Indeed, as best as it can be discerned from the record, from approximately 1993 to 1998, Krumm had only lived intermittently with his grandmother, and from 1999 to 2002, numerous police reports indicate that he had not lived with his grandmother. Then, in May of 2003, while searching for work in North Carolina, Krumm was injured in the accident. Krumm's legal guardian brought suit against defendant Auto-Owners claiming that he was entitled to first-party benefits under his grandmother's policy because he had been domiciled in her home. After extensive discovery, the trial court granted defendant's motion for summary disposition, holding that Krumm was not "domiciled in the same household" as his grandmother. Yet, based on statements that Krumm intended to return to

Michigan at some uncertain time in the future, the Court of Appeals held that a question of fact existed as to whether Krumm had been domiciled in Michigan.

By denying leave to appeal, the majority leaves intact a lower court decision that holds that a 29-year-old married man with children, who had been living in another state for a significant period of time, may be considered "domiciled" in Michigan. Even viewing the evidence in a light most favorable to plaintiff, hearsay statements that Krumm intended to return to Michigan do not provide a reasonable basis for finding that he was "domiciled in the same household" as his grandmother. An intent to return to his grandmother's house at some indefinite time in the future, or "some day," is insufficient to find that Krumm was "domiciled in the same household" as his grandmother, in light of the understanding of domicile as that place where a person has the "*present* intention" of making his home. If evidence that a person has been "contemplating," "mulling over," "pondering," or "speculating about," the idea of returning to a place at which he lived intermittently in the past is deemed adequate to sustain a finding of domicile, then traditional notions of this concept will be eroded. The financial consequences of the majority's creative understanding of "domicile" will, of course, be borne by policy holders in Michigan through higher premiums.

Despite the Chief Justice's assertion to the contrary, the facts here are not "in dispute," only their relevance. Her concurring statement identifies a laundry-list of factors drawn from case-law that may or may not be relevant in particular cases in determining domicile, and asserts that I have failed in this dissent to mention each of these. However, even the Chief Justice's enumeration of factors falls well short of identifying the "totality of circumstances" that conceivably could be relevant in the determination of a domicile. There is no end to the universe of factors that could be relevant to such a determination in a proper case. However, what is dispositive here is the *standard* by which domicile is determined—domicile exists only in that place "where a person has voluntarily fixed his abode not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time." I have set forth the entirety of factors that, in my judgment, conduce toward a finding that domicile—wherever it obtained for Krumm at the time of the accident—did *not* obtain at his grandmother's house in Michigan. I do not believe that a reasonable finder of fact could have aggregated the factors collected by the Chief Justice to reasonably conclude any differently.

CORRIGAN, J., joined the statement of MARKMAN, J.

Summary Disposition December 10, 2010:

MARTIN v LEDINGHAM, No. 138636; reported below: 282 Mich App 158. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, and we remand this case to the Emmet Circuit Court for entry of an order denying the defendant's motion for summary disposition. Because the plaintiff's expert witness testified at his deposition that, if the nurses had timely informed the treating physician of the plaintiff's deteriorating condition, the standard of care would have

required the treating physician to treat the plaintiff differently than he did, while the treating physician averred in his affidavit that he would not have treated the plaintiff any differently than he did even if the nurses had timely informed him of the plaintiff's deteriorating condition, a question of material fact exists that must be resolved by a jury. That is, having presented expert testimony regarding the treatment that the plaintiff, pursuant to the standard of care, should have received in the first 72 hours post-surgery, the treating physician's averment that he would have acted in a manner contrary to this standard of care presents a question of fact and an issue of credibility for the jury to resolve. See *White v Taylor Distrib Co*, 482 Mich 136, 141 (2008) (stating that a question of material fact existed for the jury to decide because the defendant's deposition testimony that he "felt great" before he blacked out was called into question by the defendant's treating physicians' deposition testimony that the "defendant's condition would have caused ongoing symptoms such as cramps and pain"). We agree with the assertion in Judge GLEICHER's concurring opinion in *Ykimoff v W A Foote Mem Hosp*, 285 Mich App 80, 121, 124 (2009), that the Court of Appeals "incorrectly decided *Martin*," and that "plaintiff's expert testimony called into question the credibility of the surgeons' affidavits by asserting that the standard of care applicable to the affiants required swifter intervention."

Leave to Appeal Denied December 10, 2010:

YKIMOFF v W A FOOTE MEMORIAL HOSPITAL, No. 139561; reported below: 285 Mich App 80.

HUGHES v AMERISTAR JET CHARTER, INCORPORATED, No. 141315; Court of Appeals No. 296152.

PATTY v AMERISTAR JET CHARTER, INCORPORATED, No. 141317; Court of Appeals No. 296153.

In re BRATCHER, No. 141686; Court of Appeals No. 295727.

STUDLEY v HILL TOWNSHIP, No. 142190; Court of Appeals No. 300782.

YOUNG, J. (*concurring*). I concur in the order denying leave. This case comes to us on an interlocutory appeal, and the defendants have not shown that their rights will be *irreparably* damaged by the failure of this Court to intervene at this time.

The defendants claim that, contrary to *Tomecek v Bavas*, 482 Mich 484 (2008), the plaintiffs are attempting to effect a change in substantive property rights through proceedings under the Land Division Act (LDA), MCL 560.101 *et seq*. However, the record below is simply not sufficiently developed to determine the merits of defendants' claim, especially since no final order has affected defendants' substantive property rights. Furthermore, the defendants may appeal by right any final order or judgment that purports to alter their substantive property rights. Accordingly, there is no need for this Court to intervene at this time.

Summary Disposition December 16, 2010:

ANGEL v A1 SOUTH/GRAND RAPIDS GRIFFINS, No. 141169; Court of Appeals No. 295015. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We do not retain jurisdiction.

JOHN GUIDOBONO II REVOCABLE TRUST AGREEMENT v JONES, No. 141522; Court of Appeals No. 290589. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals in part. The Court of Appeals erred in concluding that the doctrine of acquiescence applies to easements. See, e.g., *West Mich Dock & Market Corp v Lakeland Investments*, 210 Mich App 505 (1995); *McQueen v Black*, 168 Mich App 641 (1998); *Wood v Denton*, 53 Mich App 435 (1974). In all other respects, the application for leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

Leave to Appeal Denied December 16, 2010:

PEOPLE v CORREA, No. 141388; Court of Appeals No. 290271.

MARKMAN, J. (*concurring*). I concur in this Court's decision to deny leave to appeal. However, I take this opportunity to express my concerns regarding this Court's decision in *People v Bullock*, 440 Mich 15 (1992), and its establishment of proportionality review of criminal sentences under Const 1963, art 1, § 16, which provides that "cruel or unusual punishment shall not be inflicted." *Bullock* held that proportionality is a component of "cruel or unusual" punishment even though as early as 1890, this Court had rejected such an understanding of the Constitution. *People v Morton*, 80 Mich 634 (1890). As this Court explained in *Morton*:

> Counsel for defendants claims that, as properly understood, it means, when used in this connection, punishment out of *proportion* to the offense. If by this is meant the *degree* of punishment, we do not think the contention correct. . . .
>
> "We first find the injunction against cruel and unusual punishment in the Declaration of Rights, presented by the convention to William and Mary before settling the crown upon them in 1688. That declaration recites the crimes and errors which had made the revolution necessary. These recitals consist of the acts only of the former king and the judges appointed by him, and one of them was that 'illegal and cruel punishment had been inflicted.' * * * The punishments complained of were the pillories, slittings, and mutilations which the corrupt judges of King James had inflicted without warrant of law, and the declaration was aimed at the acts of the executive; for the judges appointed by him, and removable at pleasure, were practically part of the executive. It clearly did *not* then refer to the *degree* of punishment, for the criminal law of England was at that time disgraced by the infliction of the very gravest punishment for slight offenses, even

> petit larceny then being punishable with death. But the declaration was intended to forbid the imposition of punishment *of a kind* not known to the law, or not warranted by the law." [*Id.* at 638 (citation omitted) (emphasis added).]

The Court then proceeded to quote Justice COOLEY's treatise, Constitutional Limitations:

> "Probably any punishment declared by statute for an offense which was punishable in the same way at the common law could not be regarded as cruel or unusual, in the constitutional sense. And probably any new statutory offense may be punished to the extent and in the *mode* permitted by the common law for offenses of similar nature. But those degrading punishments, which in any state had become obsolete before its existing constitution was adopted, we think may well be held forbidden by it as cruel and unusual. We may well doubt the right to establish the whipping-post and the pillory in states where they were never recognized as instruments of punishment, or in states whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishments. In such states the public sentiment must be regarded as having condemned them as cruel, and any punishment which, if ever employed at all, has become altogether obsolete, must certainly be looked upon as unusual." [*Id.* at 638-639 (citation omitted) (emphasis added).]

The Court then concluded that because "[i]mprisonment for larceny is, and always has been, in this country and in all civilized countries, one of the *methods* of punishment," it does not violate the Cruel or Unusual Punishment Clause. *Id.* at 639 (emphasis added).

While "the Clause disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed," the clause "contains no proportionality guarantee" and, thus, " 'the length of the sentence actually imposed is purely a matter of legislative prerogative.' " *Harmelin v Michigan*, 501 US 957, 962, 965, 976 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.) (citation omitted).[1] Indeed, "to use the phrase 'cruel and unusual punishment' to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly." *Id.* at 977. "[T]he Clause does not expressly refer to proportionality or invoke any synonym for that term, even though the Framers were familiar with the concept, as evidenced by several founding-era state constitutions that required (albeit without defining) proportional punishments." *Graham v Florida*, 560 US ___; 130 S Ct 2011, 2044 (2010)

---

[1] US Const, Am VIII prohibits the infliction of "cruel *and* unusual punishments." (Emphasis added.) The relevance of the distinction between "and" and "or" in the United States and Michigan constitutions, respectively, was at issue in *Bullock*.

(Thomas, J., dissenting); see also, generally, *Solem v Helm*, 463 US 277 (1983); *Ewing v California*, 538 US 11 (2003).

Furthermore, "[w]hile there are relatively clear historical guidelines and accepted practices that enable judges to determine which *modes* of punishment are 'cruel and unusual,' *proportionality* does not lend itself to such analysis." *Harmelin*, 501 US at 985 (emphasis in the original). That is, I fail to see how I, as a judge, am any more qualified than the Legislature, as the representative body of the people, to determine the proportionality of a sentence. In her opinion concurring in part and dissenting in part in *Bullock*, 440 Mich at 63-64, Justice RILEY quoted the amicus curiae brief of the Prosecuting Attorneys Association of Michigan:

> "[I]f 'evolving standards of decency' as to the appropriate (proportionate) sentence for a crime are to be the measure of the constitutionality of a legislatively set penalty, how is such an inquiry to be carried out? What is the measure? What informs the judgment? What tools does a court have to make it? What enables a court to overrule society's expression of its 'standard of decency,' communicated through statute, imposing a different standard, which is also supposed to be *society's* standard and not the court's? Would not the court's role be to *discover* or *identify* society's 'standard of decency'—not what it should be, but what it *is*, and how better could society express [its] standard of decency than through its elected lawmakers? The alternative . . . for the judiciary is that
>
> "it is for *us* (the judiciary) to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think 'proportionate' and 'measurably contributory to acceptable goals of punishment'—to say and mean that, is to replace judges of the law with a committee of philosopher-kings. *Standford v Kentucky* [492 US 361, 379; 109 S Ct 2969; 106 L Ed 2d 306, 324 (1989)]." [Opinion of Scalia, J., emphasis in original.]

As Justice Thomas recently explained in responding to the majority's admittedly "independent" "moral" determination that the constitution does not permit a juvenile offender to be sentenced to life in prison without parole for a non-homicide offense:

> I am unwilling to assume that we, as members of this Court, are any more capable of making such moral judgments than our fellow citizens. Nothing in our training as judges qualifies us for that task, and nothing in Article III gives us that authority. [*Graham*, 560 US at ___; 130 S Ct at 2043 (Thomas, J., dissenting).]

And as Justice Scalia also remarked:

> [T]he Court having pronounced that the Eighth Amendment is an ever-changing reflection of "the evolving standards of decency' in our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people. [*Roper v Simmons*, 543 US 551, 616 (2005) (Scalia, J., dissenting) (emphasis in the original).]

"Proportionality review . . . threatens to undermine the democratic process by preventing the legislative branch from performing one of its most basic functions—defining crime and punishment." Casenote, Atkins v Virginia: *Nothing left of the independent legislative power to punish and define crime*, 11 Geo Mason L R 805, 876 (2003).

Because imprisonment is not a cruel or unusual method of punishment, the Court of Appeals did not err in holding that defendant's minimum sentence of 25 years in prison does not violate the cruel or unusual punishment clause. For that reason, I concur in this Court's decision to deny leave to appeal. However, at some point, this Court should revisit *Bullock*'s establishment of proportionality review of criminal sentences and reconsider Justice RILEY's dissenting opinion in that case.

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

KELLY, C.J., and CAVANAGH, J., would grant leave to appeal.

MIDWEST BUS CORPORATION v DEPARTMENT OF TREASURY, No. 140990; reported below: 288 Mich App 334.

CAVANAGH, J., would grant leave to appeal.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v MARVIN MILLER, No. 141014; reported below: 288 Mich App 207.

PEOPLE v GORECKI, Nos. 141302 and 141303; Court of Appeals Nos. 288902 and 288965.

KELLY, C.J., would grant leave to appeal.

RUBENFAER v PHC OF MICHIGAN, INCORPORATED, No. 141464; Court of Appeals No. 289044.

MYERS v MARSHALL MEDICAL ASSOCIATES, No. 141476; Court of Appeals No. 295686.

CISTRUNK v OAKWOOD HERITAGE HOSPITAL, No. 141485; Court of Appeals No. 287457.

EVERETT v AUTO OWNERS INSURANCE COMPANY, No. 141491; Court of Appeals No. 287640.

KELLY, C.J., and HATHAWAY and DAVIS, JJ., would grant leave to appeal.

PEOPLE v SWAIN, No. 141504; reported below: 288 Mich App 609.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

In re STILLSON ESTATE, No. 141546; Court of Appeals No. 286777.

PEOPLE v BACON, No. 141564; Court of Appeals No. 298187.

KELLY, C.J., and CAVANAGH, J., would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v HARRISON, No. 141828; Court of Appeals No. 299108.

Rehearing Denied December 17, 2010:

In re CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN (WAESCHLE v OAKLAND COUNTY MEDICAL EXAMINER), No. 140263. Reported at 488 Mich 1.

Leave to Appeal Granted December 17, 2010:

PROGRESSIVE MICHIGAN INSURANCE COMPANY v SMITH, No. 141255; reported below: 287 Mich App 537.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered December 17, 2010:

PEOPLE v DUNCAN, No. 141672; Court of Appeals No. 292602. At oral argument, the parties shall address whether the trial court abused its discretion in granting the defendant a new trial, for the reasons stated in the Court of Appeals dissenting opinion.

CAVANAGH, J., would deny leave to appeal.

Leave to Appeal Denied December 17, 2010:

CLARK v SWARTZ CREEK COMMUNITY SCHOOLS, No. 141394; Court of Appeals No. 295830.

MARKMAN, J. (*concurring*). I concur in this Court's decision to deny leave to appeal. The Legislature established the State Tenure Commission and vested with it "such powers as are necessary to carry out and enforce the provisions of [the Teachers' Tenure Act]," including the authority to determine whether a school district has established "reasonable and just cause" for a tenured teacher's discharge. MCL 38.137; MCL 38.101. A decision of the tenure commission must be upheld if there is "competent, material, and substantial evidence on the whole record" to support the tenure commission's findings. Const 1963, art 6, § 28. Therefore, the job of this Court is not to determine whether, in our own judgment, we believe a teacher should or should not be discharged, but only whether there is "competent, material and substantial evidence" on the record to sustain the decision of the tenure commission. There may

well be instances in which individual justices share the school district's concerns regarding the fitness of a teacher, but in which nonetheless we are obligated under the law to uphold the commission. I fully understand the concerns of the school district, and parents, that children not be instructed by a person whom they believe to be mentally unfit. Under the law enacted by their Legislature, however, the *district* bears the burden of proof of demonstrating this fact.

In re SESSIONS, No. 142085; Court of Appeals No. 295145.

Leave to Appeal Denied December 20, 2010:

PEOPLE v BECK, No. 140962; Court of Appeals No. 295319.

MCCORMICK v MCCORMICK, No. 140986; Court of Appeals No. 283209.

PEOPLE v PHELPS, No. 141041; reported below: 288 Mich App 123.

PEOPLE v HALCOMB, No. 141057; Court of Appeals No. 296470.

ONE'S TRAVEL LTD v DEPARTMENT OF TREASURY, Nos. 141080 and 141081; reported below: 288 Mich App 48.

DURAY DEVELOPMENT v PERRIN, No. 141106; reported below: 288 Mich App 143.

OSHTEMO CHARTER TOWNSHIP v KALAMAZOO COUNTY ROAD COMMISSION, No. 141151; reported below: 288 Mich App 296.

CHELSEA INVESTMENT GROUP LLC v CITY OF CHELSEA, No. 141188; reported below: 288 Mich App 239.

PEOPLE v THOMAS WRIGHT, No. 141354; Court of Appeals No. 295472.

PEOPLE v DOMINIQUE MAYES, No. 141373; Court of Appeals No. 290962.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v GORDON-NIX, No. 141478; Court of Appeals No. 297920.

PEOPLE v CRUZ, No. 141508; Court of Appeals No. 289052.

ARATH II, INCORPORATED v HEUKELS COUNTY DRAIN DISTRICT, No. 141509; reported below: 288 Mich App 324.

PEOPLE v SANFORD, No. 141527; Court of Appeals No. 289439.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

36TH DISTRICT COURT v AFSCME LOCAL 3308, No. 141536; Court of Appeals No. 291643.

PEOPLE v ROBERSON, No. 141538; Court of Appeals No. 291436.

PEOPLE v AUGUST, No. 141568; Court of Appeals No. 290472.

PEOPLE v WOODLEY, No. 141592; Court of Appeals No. 291040.

PEOPLE v COUSINO, No. 141593; Court of Appeals No. 296539.

PEOPLE v MCLEMORE, No. 141594; Court of Appeals No. 298388.

PEOPLE v HERCULES-LOPEZ, No. 141599; Court of Appeals No. 280887.

KATZ v RIVERWOOD SUBDIVISION HOMEOWNERS ASSOCIATION, No. 141600; Court of Appeals No. 288624.

PEOPLE v HERP, No. 141604; Court of Appeals No. 291484.

PEOPLE v PETHERS, No. 141609; Court of Appeals No. 290392.

PEOPLE v HUNT, No. 141625; Court of Appeals No. 289708.

PEOPLE v RUDOLPH, No. 141636; Court of Appeals No. 287594.

PEOPLE v CASTILLO, No. 141638; Court of Appeals No. 290698.

PEOPLE v GLOBE, No. 141642; Court of Appeals No. 290283.

DOE v DOE, No. 141649; reported below: 289 Mich App 211.

PEOPLE v BOBBY HOWARD, No. 141650; Court of Appeals No. 289077.

PEOPLE v ATCHINSON, No. 141654; Court of Appeals No. 291671.

PEOPLE v DAWSON, No. 141656; Court of Appeals No. 289931.

PEOPLE v KELLY WRIGHT, No. 141663; Court of Appeals No. 292717.

PEOPLE v CHAPPELL, No. 141669; Court of Appeals No. 290834.

GRIEVANCE ADMINISTRATOR v TOCA, No. 141671.

PEOPLE v BROWDER, No. 141675; Court of Appeals No. 298393.

PEOPLE v KNOX, No. 141680; Court of Appeals No. 298531.

PEOPLE v FREEMAN, No. 141682; Court of Appeals No. 290679.

PEOPLE v HAYNES, No. 141687; Court of Appeals No. 291576.

PEOPLE v CARL MILLER, No. 141689; Court of Appeals No. 291357.

PEOPLE v NEWBLE, No. 141693; Court of Appeals No. 288899.

PEOPLE v ANTHONY WILLIAMS, No. 141698; Court of Appeals No. 292070.

PEOPLE v CANNON, No. 141700; Court of Appeals No. 298546.

PEOPLE v ODUSKY, No. 141704; Court of Appeals No. 298532.

PEOPLE v BEENE, No. 141705; Court of Appeals No. 289862.

OAKLAND COUNTY PROSECUTOR v PAROLE BOARD, No. 141706; Court of Appeals No. 297250.

PEOPLE v TRAMBLE, No. 141712; Court of Appeals No. 291902.

PEOPLE v CAGE, No. 141715; Court of Appeals No. 291459.

PEOPLE v RICKMAN, No. 141723; Court of Appeals No. 292030.

PEOPLE v TRICE, No. 141726; Court of Appeals No. 297021.

LEVAINE v R J TOWER CORPORATION, No. 141729; Court of Appeals No. 296762.

PEOPLE v MOYER, No. 141730; Court of Appeals No. 291606.

PEOPLE v CONNER, No. 141734; Court of Appeals No. 290284.

PEOPLE v POYNTER, No. 141743; Court of Appeals No. 298908.

MASON v AUTO CLUB INSURANCE ASSOCIATION, No. 141744; Court of Appeals No. 289719.

PEOPLE v FOUTS, No. 141765; Court of Appeals No. 298353.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v HOGGARD, No. 141775; Court of Appeals No. 299144.

PEOPLE v RODNEY HARRIS, No. 141781; Court of Appeals No. 287724.

PEOPLE v MATTHEW SABIN, No. 141782; Court of Appeals No. 289987.

PEOPLE v AGUILAR HAMPTON, No. 141783; Court of Appeals No. 299368.

PEOPLE v CLIFFORD SABIN, No. 141784; Court of Appeals No. 289988.

PEOPLE v ISAIAH CALKINS, No. 141786; Court of Appeals No. 290485.

PEOPLE v GRANDBERRY, No. 141792; Court of Appeals No. 291235.

PEOPLE v GRAHAM-JONES, No. 141800; Court of Appeals No. 298629.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v PINDER, No. 141801; Court of Appeals No. 290225.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v FREDERICK, No. 141803; Court of Appeals No. 298815.

PEOPLE v VANCE, No. 141809; Court of Appeals No. 290686.

VOELKER v HOME OFFICE REALTY, No. 141811; Court of Appeals No. 291539.

PEOPLE v EDWARDS, No. 141823; Court of Appeals No. 299366.

WORD v SUTTLES TRUCK LEASING, INCORPORATED, No. 141830; Court of Appeals No. 296629.

PEOPLE v CARLSON, No. 141850; Court of Appeals No. 287420.

PEOPLE v JEREMY WILLIAMS, No. 141869; Court of Appeals No. 291363.

PEOPLE v TRUMAN, No. 141928; Court of Appeals No. 299176.

PEOPLE v NORWOOD, No. 141960; Court of Appeals No. 290852.

PEOPLE v ANDREW BREEDING, No. 141964; Court of Appeals No. 291554.

Superintending Control Denied December 20, 2010:

FROLING v ATTORNEY GRIEVANCE COMMISSION, No. 141621.

Reconsideration Denied December 20, 2010:

PEOPLE v WITHERSPOON, No. 139383; Court of Appeals No. 292216. Leave to appeal denied at 488 Mich 852.

GENAW v GENAW, No. 140017; Court of Appeals No. 284214. Summary disposition at 486 Mich 940.

HARRIS v DETROIT PUBLIC SCHOOLS, No. 140888; Court of Appeals No. 283472. Leave to appeal denied at 488 Mich 853.

PEOPLE v EDWARD OLIVER, No. 141072; Court of Appeals No. 288630. Leave to appeal denied at 487 Mich 858.

PEOPLE v CHU, No. 141091; Court of Appeals No. 295352. Leave to appeal denied at 488 Mich 870.

PEOPLE v HARTMAN, Nos. 141225 and 141227; Court of Appeals Nos. 296703 and 296704. Leave to appeal denied at 488 Mich 871.

SCHELLENBERG v BINGHAM TOWNSHIP, No. 141233; Court of Appeals No. 289801. Leave to appeal denied at 488 Mich 871.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

PEOPLE v DOUGHRITY, No. 141323; Court of Appeals No. 295807. Leave to appeal denied at 488 Mich 872.

PEOPLE v CARRODINE, No. 141369; Court of Appeals No. 289802. Leave to appeal denied at 488 Mich 872.

SWANSON v WESTGATE LIVING CENTRE, No. 141417; Court of Appeals No. 297213. Leave to appeal denied at 488 Mich 873.

PEOPLE v THADDEUS WILLIAMS, No. 141430; Court of Appeals No. 295546. Leave to appeal denied at 488 Mich 858.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

Statements Regarding Decisions on Motion for Disqualification Entered December 22, 2010:

MCCARTHY v SOSNICK, Nos. 141439, 141440, 141442, and 141443; Court of Appeals Nos. 293482, 293483, 294383, and 294385.

KELLY, C.J. Plaintiff has moved for my disqualification in his motion for reconsideration of this Court's denial of his application for leave to appeal. Plaintiff has failed to substantiate any basis for my recusal. Because I have no actual bias and there is no appearance of impropriety, nor do any other grounds exist supporting my disqualification, I deny plaintiff's motion.

CAVANAGH, J. Plaintiff has moved for my disqualification in his motion for reconsideration of this Court's denial of his application for leave to appeal. Plaintiff has failed to substantiate any basis for my recusal. Because I have no actual bias and there is no appearance of impropriety, nor do any other grounds exist supporting my disqualification, I deny plaintiff's motion.

CORRIGAN, J. Plaintiff's claim that I am personally biased against him is untrue and without basis in fact. Because I am aware of no basis justifying my disqualification, I deny his motion to disqualify me.

YOUNG, J. Plaintiff has moved for my disqualification, along with the disqualification of my six colleagues on the Court, claiming that all seven justices are personally biased against him. Any claim that I am personally biased against plaintiff is categorically untrue and wholly without basis in fact. Aside from plaintiff's unfounded allegation, I am unaware of any other justification for my disqualification. Therefore, I deny his motion to disqualify.

MARKMAN, J. Plaintiff has moved for my disqualification, along with that of all other justices on the Court, pursuant to MCR 2.003(C)(1)(a), (b), (f), and (g)(iii). Because plaintiff's motion establishes utterly no basis for my disqualification, I deny the motion. First, I am not "biased or prejudiced for or against a party or attorney" in this case. MCR 2.003(C)(1)(a). Second, my participation will not create an "appearance of impropriety" in this case. MCR 2.003(C)(1)(b). Third, neither myself nor any of my family members "has more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding." MCR 2.003(C)(1)(f). Fourth, neither myself nor any of my family members has "more than [a] de minimis interest that could be substantially affected by the proceeding." MCR 2.003(C)(1)(g)(iii). Finally, there is no other basis under MCR 2.003 that would require that I be disqualified from participation in this case.

In *McCarthy v Scofield*, 486 Mich 1075 (2010), four justices, including myself, voted to deny plaintiff's application for leave to appeal (although in a separate concurrence, I indicated that I could "understand plaintiff's

frustration with the manner in which the law has operated in his case"), and plaintiff filed a motion for reconsideration accompanied by a motion to disqualify the four justices who had voted to deny his application. In my statement denying plaintiff's motion for disqualification, I noted

> that plaintiff's disqualification motion is directed toward only the four justices of this Court whose votes did not favor plaintiff in his underlying case, even though, almost certainly, there is not a whit of difference between the "relationships" of the four challenged justices, and the "relationships" of the three unchallenged justices, with defendants. Quite obviously, the only distinction is that plaintiff believes the unchallenged justices will continue to favor his position and the challenged justices will continue not to do so. This has nothing to do with ethics, but much to do with skewing a fair process. [*Id.* at 1077.]

Plaintiff has now proved this to be an accurate statement. This Court unanimously voted to deny plaintiff's application for leave to appeal and plaintiff has now filed a motion for reconsideration and a motion to disqualify the entire Court. Apparently, filing motions to disqualify those justices who vote to deny his applications for leave to appeal has become plaintiff's modus operandi. As I said in my last statement denying plaintiff's motion to disqualify me, "[p]laintiff's motion should serve to remind those assessing the impact of the Court's new disqualification rules why such rules are likely both to incentivize motions to disqualify justices, and to politicize the disqualification process." *Id.* at 1076.

However frivolous plaintiff's motion, it has now required that seven justices read, consider, and explain in writing whether and why each will continue to participate in this case. And

> [p]laintiff will now have 14 days in which to ponder the responses of the [seven] challenged justices, and to determine whether to compel the participation of the entire Court in reviewing the disqualification decisions of each of the [seven] challenged justices. If plaintiff chooses to compel the participation of the entire Court, each of its seven justices will then be required to review each of the challenged justices' statements and set forth in writing whether each of the challenged justices should be disqualified from participation, and the challenged justice will then be entitled to respond. Thus, there will be the interruption and delay of this Court's work, involving in this case as many as [63] separate statements and responses by justices addressing plaintiff's motion . . . . [*Id.*]

I deny plaintiff's motion, and reiterate my concerns about this Court's new disqualification procedures.

HATHAWAY, J. Plaintiff has moved for my disqualification in his motion for reconsideration of this Court's denial of his application for leave to appeal. Plaintiff has failed to substantiate any basis for my recusal.

Because I have no actual bias and there is no appearance of impropriety, nor do any other grounds exist supporting my disqualification, I deny plaintiff's motion.

DAVIS, J. Plaintiff has made a motion to disqualify me, along with all other justices on this Court, pursuant to MCR 2.003. Because I am not biased or prejudiced for or against a party or attorney in this matter, I deny plaintiff's motion to disqualify me from participation.

Leave to Appeal Denied December 22, 2010:

ROBELIN v SPECTRUM HEALTH HOSPITALS, No. 139860; Court of Appeals No. 279780.

On November 4, 2010, the Court heard oral argument on the application for leave to appeal the September 10, 2009, judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

KELLY, C.J. (*concurring*). I concur with the order denying leave to appeal. I do not believe that the lower courts misapplied the legal standards governing the admissibility of expert testimony or that allowing the testimony of plaintiff's expert was improper.

FACTS AND PROCEEDINGS

Plaintiff's daughter, Teija McCall, was born at defendant Spectrum Hospital in 2001. Shortly after her birth, she suffered a neonatal stroke. As a result, she is unable to walk without assistance and has had significant developmental delays in language and speech.

Plaintiff filed this medical malpractice action in 2004, alleging that McCall suffered hypoxia, which caused the stroke, which in turn caused neurological disabilities. The parties dispute when the stroke occurred and whether the health care professionals missed indicators of it.

In 2008, defendants moved to strike the testimony of Dr. Ronald Gabriel, plaintiff's causation expert. The trial court held a *Daubert*[1] hearing on the issue but ultimately denied the motion. The Court of Appeals denied interlocutory leave to appeal and denied defendants' motion for a peremptory reversal. Defendants appealed here, and we remanded the case to the Court of Appeals for consideration as on leave granted.[2]

In 2009, on remand, the Court of Appeals affirmed the trial court's ruling denying defendants' motion to exclude Dr. Gabriel's testimony.[3] The panel ruled that the trial court had been correct in concluding that

---

[1] *Daubert v Merrell Dow Pharmaceuticals Inc*, 509 US 579 (1993).

[2] *Robelin v Spectrum Health Hosps*, 482 Mich 985 (2008).

[3] *Robelin v Spectrum Health Hosps*, unpublished opinion per curiam of the Court of Appeals, issued September 10, 2009 (Docket No. 279780).

Dr. Gabriel simply used the process of elimination, a time-honored and well-tested means of reaching a conclusion.

In 2010, defendants again sought leave to appeal in this Court. We heard oral argument on the application.[4]

ANALYSIS

MCL 600.2955(1) and MRE 702 require that an expert's opinion be "reliable," "assist the trier of fact," and be "the product of reliable principles and methods."[5] The Court of Appeals has held that, as long as the basic methodology and principles utilized by an expert are "sound and create a trustworthy foundation for the conclusion reached, the expert testimony is admissible no matter how novel."[6]

In this case, the trial court did not use the magic word "reliable" or the phrase "will assist the trier of fact." However, the trial court conducted a lengthy two-day *Daubert* hearing to evaluate Dr. Gabriel's proposed testimony. The court concluded that the testimony has "a foundation in fact and in science, and is based, at least in reasonable degree, upon demonstrable data."

In that ruling, the court discussed its "gatekeeping function" under *Daubert* and addressed each of the factors in MCL 600.2955(1). It certainly does not appear to me, as it does to the dissenters, that the trial court's ruling involved an "oversight" as to what was required of it.

The dissenters also criticize the trial court's application to Dr. Gabriel's testimony of the factors set forth in MCL 600.2955(1)(a), (b), (e), and (g). Contrary to the dissenters, I believe that the trial court did conclude that Dr. Gabriel's theory had been subject to testing under MCL 600.2955(1)(a). The court noted that it would be impracticable to do prospective studies of this sort, so "replication" was impossible. However, it pointed to retrospective studies analyzing data that "does seem to indicate some causal nexus between hypoxia in the prenatal state and a neonatal stroke."

Regarding factor (b), the court explicitly found that journal articles in the record seemingly demonstrated the causal nexus that Dr. Gabriel asserted and had been subject to peer review. Hence, his opinion on causation and its basis have been subject to peer review. It appears that the dissent reads MCL 600.2955(1)(b) as requiring that a peer-reviewed article mention Dr. Gabriel by name and attribute the opinion specifically to him. This is an overly restrictive view of factor (b). The only requirement in MCL 600.2955(1)(b) is that the expert opinion and its basis have been subjected to peer review.

Regarding factor (g), the trial court specifically found that "the articles referenced certainly are outside the context of litigation." Simply

---

[4] *Robelin v Spectrum Health Hosps*, 486 Mich 851 (2010).

[5] MCL 600.2955(1); MRE 702.

[6] *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 492 (1997), citing *Daubert*, 509 US at 596.

because Dr. Gabriel's opinion is retrospective in nature does not preclude it or his methodology from being used outside the context of litigation.

Regarding factor (e), I agree with the dissent that the trial court should have considered a "relevant expert community" expanding beyond plaintiff's and defendants' experts. This factor directs trial courts to consider whether an opinion and its basis are generally accepted by "individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market." Thus, the trial court should have considered the broader expert community when evaluating this factor.

Nonetheless, because the trial court otherwise fulfilled its gatekeeper function, I do not believe that its misapplication of one of many evaluative criteria warrants reversal. Moreover, the trial court also applied the three other factors from MCL 600.2955(1), and the dissent does not take issue with its application of those factors.

The dissenters similarly err in their criticisms of the Court of Appeals' decision. Their criticisms are premised on its conclusion that Dr. Gabriel's retrospective use of the process of elimination is flawed because there are no known predictors of neonatal strokes. Therefore, supposedly, defendants could not have acted prospectively to prevent McCall's stroke. However, Dr. Gabriel's proposed testimony was that evidence arising before and after McCall's birth demonstrated that she experienced hypoxia and a decreased heart output, leading to a blood clot and stroke. The medical literature in the record establishes that perinatal asphyxia is considered the most common cause of neonatal stroke. If the treating physicians could have discerned that McCall suffered hypoxia, it was foreseeable that she could suffer a neonatal stroke. Thus, *Chapin v A & L Parts Inc*,[7] is not distinguishable and Dr. Gabriel's testimony was properly admitted.

Moreover, the dissenters assert that Dr. Gabriel's process of elimination methodology fails to establish that whatever remains is a proximate cause of the alleged injury. They are mistaken. It is certainly true that "correlation does not equal causation."[8] However, this argument has nothing to do with the *reliability* of Dr. Gabriel's opinion. Instead, what the dissenters seem to be arguing is that plaintiff's claim must fail as a matter of law for failure to show proximate cause. As we are not reviewing a motion for summary disposition, this argument is outside the scope of this Court's review.

CONCLUSION

The trial court adequately performed its gatekeeper function under *Daubert*, MCL 600.2955, and MRE 702. Therefore, it did not "shirk[] its responsibility," as the dissent contends, nor was its decision to admit Dr. Gabriel's testimony an abuse of discretion. Thus, I concur in the order denying defendants' application for leave to appeal.

---

[7] 274 Mich App 122 (2007).

[8] *Post* at 1007-1008.

CAVANAGH and HATHAWAY, JJ., would affirm the judgment of the Court of Appeals.

CORRIGAN, J. (*dissenting*). I would reverse the judgment of the Court of Appeals and remand for entry of an order granting defendants' motion to strike the testimony of plaintiff's proffered causation expert. By denying leave to appeal today, the Court fails to correct the misapplication of the legal standards that govern the admissibility of expert testimony. Accordingly, I respectfully dissent.

I. FACTUAL AND PROCEDURAL BACKGROUND

In May 2001, plaintiff's daughter, Teija McCall, suffered a neonatal stroke, which resulted in the now nine-year-old child experiencing severe developmental disabilities. On October 25, 2004, plaintiff filed this medical malpractice action, alleging that the stroke could have been prevented if defendants timely diagnosed and treated the fetal distress and immediately delivered McCall via caesarian section, rather than permitting plaintiff's vaginal delivery to proceed. Defendants disputed the timing and the cause of the stroke. Defendants also moved to strike the testimony of plaintiff's proffered causation expert, Dr. Ronald Gabriel, arguing that Dr. Gabriel's proposed testimony did not meet the criteria set forth in MCL 600.2955 and MRE 702.

After conducting a two-day *Daubert*[1] hearing, the trial court issued an opinion from the bench. The court denied defendants' motion to strike, opining that it would admit Dr. Gabriel's testimony and "let the chips fall where they may." On remand from this Court, the Court of Appeals affirmed the trial court's decision.[2] The Court of Appeals concluded that the trial court did not abuse its discretion in admitting Dr. Gabriel's testimony, stating in part:

> The trial court correctly concluded that Dr. Gabriel simply used process of elimination, a sufficiently tested and time-honored way to arrive at an answer that it is even the quintessential Sherlock Holmes methodology. Stated in various ways in various books, once all impossibilities are filtered out, whatever remains, irrespective of its improbability, must be the truth.[10]

---

[10] In *The Hound of the Baskervilles*, chapter 4, Sherlock Holmes observed that "we balance probabilities and choose the most likely. It is the scientific use of the imagination, but we have always some material basis on which to start our speculation."

Defendants applied for leave to appeal in this Court. We heard oral argument on the application.

---

[1] *Daubert v Merrell Dow Pharm Inc*, 509 US 579 (1993).

[2] *Robelin v Spectrum Health Hosps*, unpublished opinion per curiam of the Court of Appeals, issued September 10, 2009 (Docket No. 279780), p 6.

II. ANALYSIS

An abuse of discretion occurs when the trial court's decision to admit or exclude evidence, including expert testimony, falls outside the range of principled outcomes.[3] When a court admits legally inadmissible evidence, it necessarily abuses its discretion.[4] In this case, the trial court abused its discretion when the court denied defendants' motion to strike the testimony of plaintiff's proffered causation expert because Dr. Gabriel's testimony fails to satisfy the exacting criteria of MCL 600.2955[5] and MRE 702.[6]

The trial court erred when it failed to expressly determine that Dr.

---

[3] *Woodard v Custer*, 476 Mich 545, 557 (2006).

[4] *Craig v Oakwood Hosp*, 471 Mich 67, 76 (2004).

[5] MCL 600.2955 provides in pertinent part:

> (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
>
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

[6] MRE 702 provides:

Gabriel's proposed testimony is reliable and that his causation opinion would assist the fact-finder. MCL 600.2955(1) states that "[i]n an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible *unless the court determines that the opinion is reliable and will assist the trier of fact*." The language of MRE 702 underscores the importance of admitting reliable expert testimony that will assist the fact-finder. MRE 702 provides in pertinent part:

> If the court determines that scientific, technical, or other specialized knowledge *will assist the trier of fact to understand the evidence or to determine a fact in issue*, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) *the testimony is the product of reliable principles and methods*, and (3) *the witness has applied the principles and methods reliably to the facts of the case*. [Emphasis added.]

Both the statute and the evidentiary rule emphasize the court's obligation to ensure that any expert testimony is reliable and will assist the fact-finder. However, the record reflects that the trial court did not make either determination. The record also reflects that the trial court failed to reference MRE 702 or determine that Dr. Gabriel's testimony: "(1) . . . is based on sufficient facts or data, (2) . . . is the product of reliable principles and methods, *and* (3) the witness has applied the principles and methods reliably to the facts of the case." Contrary to Chief Justice KELLY's view, the absence of these critical determinations on the record before us should not be minimized as a failure to "use the magic word" or sidestepped by characterizing the two-day *Daubert* hearing as "lengthy."[7] Rather, these apparent oversights demonstrate an inadequate exercise of the court's gatekeeping role and bolster the conclusion that the trial court abused its discretion when it denied defendants' motion to strike Dr. Gabriel's testimony.[8]

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[7] *Ante* at 1001.

[8] See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780 (2004) ("While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function

Although the trial court addressed the criteria set forth in MCL 600.2955(1)(a) to (g), the court erred when it failed to apply each criterion with diligence or precision. For example, the trial court acknowledged that Dr. Gabriel's opinion had not been "subjected to scientific testing and replication," contrary to § 2955(1)(a). Yet the court concluded that plaintiff met this criterion, even though it expressly found that plaintiff did not, and could not, satisfy § 2955(1)(a). The trial court also determined that plaintiff satisfied § 2955(1)(b) without identifying any publication that had subjected Dr. Gabriel's opinion to peer review. In effect, the court inverted § 2955(1)(b), which instructs it to consider "[w]hether the opinion and its basis have been subjected to peer review publication," and not whether Dr. Gabriel can extrapolate any modicum of support for his opinion from the inconclusive medical literature published to date. Additionally, the court concluded that plaintiff satisfied § 2955(1)(e), which directs the trial court to consider "[t]he degree to which the opinion and its basis are generally accepted within the relevant expert community." This finding is puzzling because the court limited its discussion of the "relevant expert community," which § 2955(1)(e) defines as "individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market," to the two causation experts who testified. Also puzzling is the trial court's failure to identify any member of the relevant expert community besides Dr. Gabriel who "generally accepted" his opinion.[9] Further, the trial court determined that plaintiff satisfied § 2955(1)(g) although the admittedly retrospective nature of Dr. Gabriel's opinion precludes it from being "relied upon by experts outside of the context of litigation." That is, Dr. Gabriel's opinion has no practical value whatsoever for those interested in predicting and preventing neonatal strokes because it relies entirely on a retrospective analysis of case-specific factors in the context of litigation. The dearth of findings that actually satisfy the criteria of § 2955(1) exposes the trial court's abuse of discretion.

The Court of Appeals essentially glossed over the trial court's flawed analysis and concluded that Dr. Gabriel's testimony should reach a jury because Dr. Gabriel derived his opinion from the process of elimination or "the quintessential Sherlock Holmes methodology." However, the Court of Appeals' offhand observation ignores the unambiguous language of the statute and the evidentiary rule. No provision in MCL 600.2955 or MRE 702 excuses the trial court from fulfilling its obligation as gatekeeper when an expert claims that the methodology underlying his opinion derives from the process of elimination. And referring to "the quintessential Sherlock Holmes methodology" does not negate the fact that the

---

inadequately.' "), quoting *Kumho Tire Co Ltd v Carmichael*, 526 US 137, 158-159 (1999) (Scalia, J., concurring).

[9] The other causation expert identified by the court, Dr. Michael Johnston, testified that "[t]here's no scientific evidence for what [Dr. Gabriel] says" and that "scientifically, what has been said, on paper and by deposition by Dr. Gabriel, is completely wrong."

trial court's role as gatekeeper "applies to *all stages* of expert analysis."[10] Indeed, the "[c]areful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation."[11] The trial court was obligated to thoroughly vet Dr. Gabriel's testimony under the criteria set forth in MCL 600.2955 and MRE 702. Quite simply, the court shirked its responsibility. The Court of Appeals clearly erred when it affirmed the trial court's misapplication of the legal standards governing the admissibility of expert testimony.

The Court of Appeals also clearly erred when it endorsed Dr. Gabriel's opinion, which purports to establish causation based on his retrospective analysis of several factors. As the Court of Appeals acknowledged, "Dr. Gabriel did not rely on any of the medical evidence for its prospective, predictive value, but rather as evidence upon which to retrospectively exclude impossible scenarios." The notion that Dr. Gabriel can testify as a causation expert based on his retrospective use of the "process of elimination" is flawed for three reasons.

First, it is undisputed that there are no known predictors of neonatal strokes. As the medical literature relied upon by Dr. Gabriel establishes, because neonatal strokes occur unexpectedly and without any known indicia, there is no foreseeable basis from which defendants could have acted to prospectively prevent McCall's stroke.[12] Critically, proximate causation requires *foreseeability*, yet Dr. Gabriel—plaintiff's proffered causation expert—cannot establish that McCall's stroke could have been predicted and avoided.

Second, the mere act of eliminating several possibilities through the process of elimination does not necessarily establish that whatever remains is a proximate cause of the injury alleged.[13] It is axiomatic that

---

[10] *Gilbert*, 470 Mich at 782 (emphasis in original).

[11] *Id*.

[12] See, e.g., Jeffery M. Perlman et al., *Neonatal stroke: Clinical characteristics and cerebral blood flow velocity measurements*, 11 Pediatric Neurology, 281 (1994) ("The data indicate that infants who develop neonatal stroke cannot be distinguished from infants who do not develop the lesion by current markers of perinatal distress. *Because neonatal stroke frequently occurs as an unanticipated event, prevention may not be possible*.").

[13] For the process of elimination to apply in the first instance, there must be some discrete universe of possibilities that have been established through the prerequisite scientific testing. Once the probabilities have been narrowed to some certain and definite number, it is logical to apply the process of elimination to establish proximate cause. In this case, it is undisputed that there are *no known predictors* of neonatal strokes. Because of the lack of any certain and definite number of predictors, indeed any known predictors at all, deductive reasoning through the process of elimination is simply inapt. This does not mean that I question the value of deductive reasoning and the process of elimination in

correlation does not equal causation. Nonetheless, Dr. Gabriel seeks to testify that a correlating event was the causal event because there are *no other known causes*. Even a cursory reading of MCL 600.2955 and MRE 702 establishes that the act of "ruling out" possibilities does not, and should not, automatically "rule in" the causation sought to be established by plaintiff's expert here.

Third, the lone case cited by the Court of Appeals to support its endorsement of Dr. Gabriel's retrospective use of the process of elimination, *Chapin v A & L Parts Inc*, 274 Mich App 122 (2007), is distinguishable from this case. In *Chapin*, the lack of epidemiological studies establishing a link between the plaintiff's occupational exposure to brake dust and mesothelioma was not outcome determinative because the link between mesothelioma and asbestos exposure was already established. As a result, deductive logic provided an appropriate means of concluding that the plaintiff's occupational exposure to asbestos caused his mesothelioma. In this case, however, there is no established link between any known predictor and neonatal strokes, as Dr. Gabriel admitted by stating that "you cannot use fetal monitoring in a prospective or predictive manner because there is none." At best, Dr. Gabriel's opinion amounts to an exercise in retrospective speculation, rather than viable deductive logic. His opinion fails to satisfy the legal standards governing the admissibility of expert testimony, and the Court of Appeals clearly erred when it reached a contrary conclusion.

III. CONCLUSION

Because the trial court failed to carefully consider the testimony of plaintiff's proffered causation expert under MCL 600.2955 and MRE 702, its decision to admit Dr. Gabriel's testimony fell outside the range of principled outcomes. The Court of Appeals clearly erred when it failed to correct the trial court's misapplication of the legal standards that govern the admissibility of expert testimony. I would reverse the judgment of the Court of Appeals and remand for entry of an order granting defendants' motion to strike. Consequently, I dissent from the Court's denial of leave to appeal.

YOUNG and MARKMAN, JJ., joined the statement of CORRIGAN, J.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

AFSCME COUNCIL 25 v WAYNE COUNTY, No. 142140; Court of Appeals No. 298655.

In re CONTEMPT OF WAYNE COUNTY CLERK, No. 142141; Court of Appeals No. 300515.

---

general, only that it has been applied here in circumstances where it cannot logically produce the conclusion drawn.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered December 27, 2010:

PEOPLE v IVEY, No. 141795; Court of Appeals No. 291592.

Leave to Appeal Denied December 27, 2010:

HOVANEC v CITY OF FLINT, No. 141253; Court of Appeals No. 289615. Costs are imposed against attorney Angela Watkins, only, in the amount of $250, to be paid to the Clerk of this Court.

CAVANAGH and HATHAWAY, JJ., would simply deny leave to appeal.

DUMAS v MILLER, Nos. 141355, 141356, 141357, 141358, and 141359; Court of Appeals Nos. 279149, 286342, 286343, 286344, and 287143.

MARKMAN, J. (*dissenting*). I would grant leave to appeal, and therefore dissent. At issue is the point of accrual of the two-year statute of limitations for professional malpractice cases. The applicable statute, MCL 600.5838(1), provides:

> [A] claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity *as to the matters out of which the claim for malpractice arose*, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. [Emphasis added.]

Here, defendant attorney represented plaintiffs' insurance sales representatives in "wrongful termination" employment litigation. Defendant continued working on appeals in this case, even after plaintiffs retained another attorney to pursue "age discrimination" claims that plaintiffs believe grew out of the same circumstances as the "wrongful termination" claims and that should have been joined with the latter claims. As a result of defendant's failure to join these claims, plaintiffs also filed a professional malpractice suit against him for the handling of their original lawsuit. The central question is whether defendant's representation of plaintiffs in their "wrongful termination" appeal can fairly be said to have occurred in the course of representing plaintiffs in "matters out of which the claim for malpractice arose," where such malpractice claim concerned defendant's failure to attach "age discrimination" claims to "wrongful termination" claims in the original lawsuit. Significantly, MCL 600.5838(1) does not refer to the singular "matter," but to the plural "matters," and does not refer to the "case," or the "claim," but to "the matters," as establishing the accrual point of its statute of limitations.

Accordingly, if under MCL 600.5838(1) the claim accrues from the time that plaintiffs hired a new attorney to replace defendant to represent them in the "age discrimination" claim, the two-year limitations period would have elapsed before the legal malpractice suit was filed against defendant.

On the other hand, if under MCL 600.5838(1) the claim accrues from the time that defendant concluded his representation of plaintiffs in the "wrongful termination" claim—the limited scope of which eventually prompted plaintiffs' malpractice action—the two-year limitations period would *not* have elapsed before the legal malpractice suit was filed against defendant.

The reading of MCL 600.5838(1) sustained by the majority may conceivably be correct, but it is hardly clear. The majority's interpretation is predicated upon a highly limited reading of the statute that would essentially equate a "case" or "claim" with "matters." Each side in this case, in my judgment, has offered reasonable arguments in support of its position that the malpractice action here is, or is not, time-barred. Because this involves a significant issue of statutory interpretation, with important practical consequences for access to the legal system, I would grant leave to appeal.

CORRIGAN, J., joined the statement of MARKMAN, J.

YOUNG, J., not participating.

PEOPLE v FRENCH, No. 141731; Court of Appeals No. 298489.

In re MARCOTTE MINORS, Nos. 142156 and 142157; Court of Appeals No. 296000.

PEOPLE v RANDOLPH SCOTT, No. 142282; Court of Appeals No. 301432.

Superintending Control Denied December 27, 2010:

HAKIM v BOARD OF LAW EXAMINERS, No. 142265.

Leave to Appeal Granted December 29, 2010:

PEOPLE v MORENO, No. 141837; Court of Appeals No. 294840. The parties shall address (1) whether a person present in his or her own home can lawfully resist a police officer who unlawfully and forcibly enters the home, without violating MCL 750.81d, (2) if not, whether, so interpreted, MCL 750.81d is unconstitutional, and (3) whether a defendant prosecuted under MCL 750.81d for resisting a police officer who unlawfully and forcibly enters the defendant's home may claim self-defense.

CORRIGAN, J. (*concurring*). I concur with the Court's order granting leave to appeal. I also request that the parties brief whether the trial court erroneously concluded that the exigent circumstances exception to the warrant requirement did not apply where the police officer testified that he smelled burning or burnt marijuana while standing by the open doorway of the defendant's home and that the entry was necessary under the circumstances to prevent the imminent destruction of evidence. See, generally, *In re Forfeiture of $176,598*, 443 Mich 261 (1993).

Leave to Appeal Denied December 29, 2010:

HOWELL EDUCATION ASSOCIATION v HOWELL BOARD OF EDUCATION, No. 140929; reported below: 287 Mich App 228.

CORRIGAN, YOUNG, and MARKMAN, JJ., would grant leave to appeal.

DERRY v DERRY, No. 141898; Court of Appeals No. 294029.

Reconsideration Granted December 29, 2010:

WILCOX v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 138602; Court of Appeals No. 290515. Leave to appeal denied at 488 Mich 930. The motion for reconsideration of this Court's November 9, 2010, order is considered, and it is granted for the limited purpose of clarifying the remand instructions issued by the Court of Appeals. The Court of Appeals stated that "[w]hether a cost constitutes an allowable expense is a question of law and so it is to be determined by the court, not the jury." Although whether an expense constitutes an "allowable expense" under MCL 500.3107(1)(a) is generally a question of law for the court, *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 525-526 (2005), "the question whether expenses are reasonable and reasonably necessary is generally one of fact for the jury," *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 55 (1990). Therefore, to the extent that there are material questions of fact pertaining to whether the expenses in this case are reasonable and reasonably necessary, these questions of fact must be decided by a jury.

CAVANAGH, J., stated as follows: Although I agree with this Court's decision to clarify the remand instructions issued by the Court of Appeals, I continue to disagree with this Court's order vacating its April 16, 2010, order and denying leave to appeal, for the reasons stated in my dissenting statement in this case. 488 Mich 930, 930-932 (2010).

KELLY, C.J., and HATHAWAY, J., joined the statement of CAVANAGH, J.

Reconsideration Denied December 29, 2010:

DUNCAN v STATE OF MICHIGAN, Nos. 139345, 139346, and 139347; reported below: 284 Mich App 246. Summary disposition at 486 Mich 906; reconsideration granted at 486 Mich 1071; reconsideration granted and order reinstated at 488 Mich 957. On order of the Court, the motion for reconsideration of this Court's November 30, 2010, order is considered, and it is denied, because it does not appear that the order was entered erroneously.

CORRIGAN, J. (*dissenting*). I dissent from the order denying defendants' motion for reconsideration of this Court's November 30, 2010, order. The majority acts today with troubling yet purposeful haste in denying defendants' motion for reconsideration before the end of the calendar year with the clear intent to prevent the newly constituted Court after January 1, 2011, from considering defendants' motion. Indeed, I anticipated the problematic expediency in which the majority would treat such a motion in my objection to the release of the November 30, 2010, order without my dissent. In particular, I stated that "[t]he Court's decision to suddenly expedite this case seems designed to prevent the new Court after January 1, 2011, from considering a motion for reconsideration." *Duncan v Michigan*, 488 Mich 957, 958 (2010).[1] Perhaps most troubling is that the denial of defendants' motion for reconsideration comes after defendants were forced to file their motion without the opportunity to

[1] My objection included with the November 30, 2010, order stated:

consider my dissenting statement to the November 30 order.[2] My dissenting statement was not issued until December 22, 2010,* which was one day after defendants were forced into filing their motion for reconsideration on December 21, 2010, in order to satisfy the 21-day

---

> I object to the release of the Court's order without my dissenting statement and I reserve the right to file one as soon as I can. The majority has decided to grant the motion for reconsideration, and to reverse our previous order, without affording disagreeing justices sufficient time to adequately respond to this decision. Instead, the majority has now decided to expedite the release of its order regardless of the fact that I have worked in a timely fashion to prepare a dissenting statement, but have not yet completed such a statement. This is contrary to our practice during the 11 years I have served on this Court. The Court's decision to suddenly expedite this case seems designed to prevent the new Court after January 1, 2011, from considering a motion for reconsideration. [*Duncan*, 488 Mich at 958.]

[2] As I set forth in my dissenting statement issued on December 22, 2010, the prior procedural history of this case is as follows:

> In this case, indigent criminal defendants in three Michigan counties brought claims alleging that they, as well as future indigent defendants, were being denied their constitutional rights to counsel and the effective assistance of counsel. After the trial court denied defendants' motion for summary disposition and granted class certification, defendants sought leave to appeal in the Court of Appeals. The Court of Appeals granted leave, and on June 11, 2009, it affirmed the trial court's denial of defendants' motion for summary disposition and the grant of class certification in a 2-1 decision. We subsequently granted leave. After hearing oral arguments in April 2010, we issued an order on April 30, 2010, vacating the trial court's grant of class certification and remanding for consideration of class certification in light of *Henry v Dow Chem Co*, 484 Mich 483 (2009). In regard to defendants' motion for summary disposition, we affirmed only the result of the Court of Appeals majority for different reasons based on the rationale that it was premature to make a decision on the substantive issues based solely on plaintiffs' pleadings. Defendants then filed a motion for reconsideration, which we granted by a vote of 4-3 on July 16, 2010. On August 6, 2010, plaintiffs filed a motion for reconsideration of the July 16, 2010, order, which the majority now grants. Despite my objection, the majority issued the order granting plaintiffs' motion for reconsideration on November 30, 2010, without my dissent in an act virtually unprecedented in the 11 years I have served on this Court. [*Id.* at 961-962 (CORRIGAN, J. dissenting) (footnotes and citations omitted).]

* See 488 Mich 957, 960-966 (2010)—REPORTER.

deadline for motions for reconsideration. See MCR 7.313(E). Thus, defendants had to file their motion without having the opportunity to review and assess my dissenting statement. This wrongly deprived them of an opportunity to consider the thinking of the full Court, in violation of our state constitution.

Specifically, our state constitution provides:

> Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. *When a judge dissents in whole or in part he shall give in writing the reasons for his dissent*. [Const 1963, art 6, § 6 (emphasis added).][3]

The majority contravenes this constitutional mandate by deciding a motion filed prior to the issuance of my constitutionally required reasons for dissenting. In my view, that my dissent has since been issued does not satisfy this provision because defendants had to file their motion prior to the issuance of my dissent in order to be timely under MCR 7.313(E). Thus, the majority has diminished the protection of this constitutional provision by implementing a timeline that required defendants to file any motion for reconsideration without the benefit of my dissent. Further, "to act with speed can only be countenanced in situations where [this Court] nonetheless satisfies its duty [under Const 1963, art 6, § 6] . . . ." *Lee v City of Utica*, 83 Mich App 679, 684 n 2 (1978) (RILEY, P.J., dissenting) (discussing this Court's use of peremptory orders). The majority's haste has thus undermined our duty under our state constitution.

I believe that counsel for a losing party cannot properly decide whether to file a motion for reconsideration or what to include in such a motion without knowing where the entire Court stands on an issue. This necessarily includes having an opportunity to evaluate each justice's position. Moreover, such an evaluation can only be made after each justice has fully enunciated his or her position. Here, the majority's calculated handling of this case deprived the litigants of the reasoning of the full Court.

The majority's lack of restraint is especially troubling given that the electorate already decided on a newly composed Court in the November 2, 2010, election. Undaunted, the majority, now paced by the calendar alone, is content in its attempt to foreclose reconsideration. I believe that the majority's handling of this case belies the way an appellate court should function. Appellate courts should be marked by steadiness and consistency, not gamesmanship in a race against the clock.

---

[3] This longstanding requirement has been in place since the adoption of the Constitution of Michigan of 1850. See Const 1850, art 6, § 10 ("The decisions of the supreme court shall be in writing, and signed by the judges concurring therein. Any judge dissenting therefrom shall give the reasons of such dissent in writing under his signature.").

Further, I believe that defendants could properly move to file a supplement to their current motion or again move for reconsideration despite the language of MCR 7.313(E). Specifically, MCR 7.313(E) provides that "[t]he clerk shall refuse to accept for filing any motion for reconsideration of an order denying a motion for reconsideration." It is axiomatic that our court rules cannot contravene our state constitution. Thus, the procedural bar in MCR 7.313(E) cannot properly be applied here, where defendants were forced to file their motion for reconsideration without the full thinking of the Court, contrary to our state constitution, Const 1963, art 6, § 6.

The denial of defendants' motion also wrongly leaves intact the erroneous November 30, 2010, order, which reinstated the April 30, 2010, order, where we erroneously affirmed the result of the Court of Appeals and remanded this case without a governing standard for evaluation of the claims. I continue to believe that the July 16, 2010, order granting defendants' motion for reconsideration of the April 30, 2010, order was properly entered. First, summary disposition is warranted because plaintiffs' claims are not justiciable.[4] In addition, the April 30, 2010, order failed to set forth a governing standard. The majority permits this case to

---

[4] In a statement that Justice YOUNG and I joined, Justice MARKMAN previously set forth that the April 30, 2010, order was erroneous for the reason that "it is not premature to decide this case because the precise issue presented is whether plaintiffs have stated a claim on which relief can be granted, and this, as well as the threshold justiciability issues, can be determined on the face of the complaint." *Duncan v Michigan*, 486 Mich 1071 (2010) (MARKMAN, J., concurring). He also set forth that summary disposition is warranted for the following reasons articulated in the Court of Appeals dissent:

> (1) The United States Supreme Court in *Gideon v Wainwright*, 372 US 335 (1963), and *Strickland v Washington*, 466 US 668 (1984), "was concerned with results, not process. It did not presume to tell the states *how* to ensure that indigent criminal defendants receive effective assistance of counsel." *Duncan v Michigan*, 284 Mich App 246, 357 (2009) (WHITBECK, J., dissenting).
>
> (2) Plaintiffs' claims would have "the judiciary override the Michigan system of local control and funding of legal services for indigent criminal defendants," despite the absence here of any constitutional violation. *Id*. at 358.
>
> (3) Plaintiffs' claims are not sufficient to create a presumption of either prejudice, or prejudice per se, that would warrant either declaratory or injunctive relief. *Id*. at 361.
>
> (4) Plaintiffs lack standing, and, therefore, their claims are not justiciable. *Id*. at 371.

continue without providing any guidance to the trial court and the litigants concerning the legal standards that will govern discovery,

---

(5) Plaintiffs' claims are not ripe for adjudication, and, therefore, their claims are not justiciable. *Id*. at 371, 376.

(6) Plaintiffs' claims are not justiciable and, therefore, the relief they seek should not be granted. *Id*. at 385.

(7) In finding a justiciable controversy, the Court of Appeals erred in adopting a number of assumptions that are conjectural and hypothetical, including assumptions that plaintiffs and the class they purport to represent will be convicted of the crimes with which they are charged, that such convictions will result from prejudice stemming from ineffective assistance of counsel, that such ineffective assistance will be attributable to the inaction of defendants, and that trial and appellate judges will be unable or unwilling to afford relief for such violations of the Sixth Amendment. *Id*. at 368-370.

(8) There is no constitutional precedent that "guarantees an indigent defendant a particular attorney" or an "attorney of a particular level of skill" [as long as the attorney is not "so deficient as to cause prejudice"]; that requires that a "predetermined amount of outside resources be available to an attorney"; or that requires that there be a "meaningful relationship with counsel." *Id*. at 370[, 384].

(9) The Court of Appeals' assertions that affording plaintiffs injunctive relief "could potentially entail a cessation of criminal prosecutions against indigent defendants," *id*. at 273 (majority opinion), and "that nothing in this opinion should be read as foreclosing entry of an order granting the type of relief so vigorously challenged by defendants," *id*. at 281, accurately describe the potential consequences of its opinion, which consequences would constitute an altogether unwarranted and improper response to plaintiffs' claims. *Id*. at 380-385 (WHITBECK, J., dissenting).

(10) The Court of Appeals has "issued an open invitation to the trial court to assume ongoing operational control over the systems for providing defense counsel to indigent criminal defendants in Berrien, Genesee, and Muskegon counties." *Id*. at 383. And with that invitation comes a "blank check" on the part of the judiciary to "force sufficient state level legislative appropriations and executive branch acquiescence" in assuming similar control over the systems in every county in this state, while "nullify[ing] the provisions" of the criminal defense act and "superseding the authority of the Supreme Court and the State Court Administrator." *Id*. at 383-384. [*Id*. at 1072.]

subsequent motions, as well as the class certification question.[5] More-

[5] As I stated in my dissenting statement to the November 30, 2010, order:

> I write to emphasize that the majority's decision to reinstate the initial order does not rectify our failure to articulate any governing standards in the initial order. Rather, the majority revives this palpable error, placing the trial court in the same quandary of operating without any governing standards in deciding plaintiffs' claims.
>
> The initial order contained an internal inconsistency because it vacated the Court of Appeals' opinion without offering any alternative analysis. All future actions in this case depend on an articulation of the standard for preconviction Sixth Amendment claims, which the initial order did not provide. Specifically, the governing standard for what constitutes effective assistance of counsel in this context is necessary for this case to properly proceed. In fact, the trial court conceded the lack of clarity in regard to whether the *Strickland v Washington*, 466 US 668 (1984), standard applies to plaintiffs' preconviction claims of inadequate representation. Transcript of motions for summary disposition and class certification, May 15, 2007, p 34. Further, the order the majority now reinstates has recently been cited as illustrating the "state of confusion created by the lack of a clear standard to which courts can look when adjudicating these types of systemic reform cases." Chiang, *Indigent defense invigorated: A uniform standard for adjudicating pre-conviction Sixth Amendment claims*, 19 Temp Pol & Civ Rts L R 443, 461 (2010). Additionally, similar class action cases have generated conflicting opinions on the appropriate constitutional standards. See *Hurrell-Harring v State*, 15 NY3d 8, 22 (2010) (reversing the holding of the Appellate Division of the New York Supreme Court that the claims of a class of indigent defendants were not justiciable and reinstating the plaintiffs' complaint because it "contained[ed] numerous plain allegations that in specific cases counsel simply was not provided at critical stages of the proceedings"); *Platt v State*, 664 NE2d 357, 363 (Ind App, 1996) (affirming the dismissal of the claims of a class of indigent defendants challenging a county indigent defense system, concluding that the claims were not reviewable because "a violation of a Sixth Amendment right will arise only after a defendant has shown he was prejudiced by an unfair trial"); *Kennedy v Carlson*, 544 NW2d 1, 8 (Minn, 1996) (reversing the decision of the district court granting the plaintiff public defender summary disposition, concluding that the plaintiff had failed to show an injury-in-fact because his claims of constitutional violations were "too speculative and hypothetical" where there was no evidence of inadequate assistance in any particular

over, the majority is content to deny defendants' alternative motion requesting that we clarify the legal standard that governs this case, despite that the continuation of this entire case hinges on the articulation of such a standard. The majority continues to brush this problem aside. I would grant defendants' motion for reconsideration of the November 30, 2010, order.

MARKMAN, J. (*dissenting*). I dissent from the order denying defendants' motion for reconsideration and defendants' motion to deem the December 22, 2010, order as the Court's final order. For the reasons stated in my statements of July 16, 2010, and November 30, 2010, I would grant defendants' motion for reconsideration, vacate this Court's order granting plaintiffs' motion for reconsideration, and reinstate this Court's July 16, 2010, order.

The procedural history of this case is unusual and raises legal issues of first impression. One such issue is whether, as Justice CORRIGAN argues, parties have a constitutional right to have dissents considered before having to file a motion for reconsideration. See Const 1963, art 6, § 6 ("When a judge dissents in whole or in part he shall give in writing the reasons for his dissent."). Here, given that Justice CORRIGAN's dissent was not issued until December 22, 2010 (with the issuance of her statement having been expressly contemplated by what this Court issued on November 30, 2010),* defendants were never afforded such an opportunity.

---

case or that the plaintiff "faced professional liability as a result of his office's substandard services"); *Luckey v Harris*, 896 F2d 479, 480 (CA 11, 1989) (Edmonson, J., dissenting) (criticizing the panel's holding that " 'deficiencies that do not meet the "ineffectiveness" standard may nonetheless violate a defendant's rights under the sixth amendment' " as "inconsistent with the language and rationale of both *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 [1984], and *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 [1984]").

Yet the majority permits this case to continue without providing any guidance to the trial court and the litigants concerning the legal standards that will govern discovery or subsequent motions. In particular, the class certification question is inextricably intertwined with the issue of what is the proper standard for evaluating systemic preconviction claims of ineffective assistance of counsel. Determining how many have or will suffer actual injury hinges entirely on what constitutes this type of injury; what type of proofs are necessary to show harm; and whether the putative plaintiffs are adequate class representatives. Thus, without a standard to form the basis for the class action analysis under *Henry*, it appears the trial court cannot properly make any determination under *Henry*. [*Duncan*, 488 Mich at 963-966 (footnotes omitted).]

* See 488 Mich 957, 960-966 (2010)—REPORTER.

Put another way, is a party entitled to assess whether to file a motion for reconsideration, and how most effectively to fashion his or her arguments in support of such a motion, only after having been fully apprised of where the entire "court" stands on the underlying issue, as opposed only to where some individual justices stand? Related to this, before a motion for reconsideration must be filed, is a party entitled to have the arguments of dissenting justices considered by the majority, so that the majority may possibly be persuaded by such arguments? Thus, the decisive issue of first impression—were defendants here required to file their motion for reconsideration within 21 days of November 30, 2010, or within 21 days of December 22, 2010?

These questions must be considered both in the context of the constitution, as Justice CORRIGAN asserts, and in the context of the court rules themselves. See MCR 7.313(E). In addition, assuming that either of these sources of the law affords a party the right to consider dissenting statements before being required to file a motion for reconsideration, what is the proper remedy where this right has not been afforded?

Unlike Justice CORRIGAN (who provides analysis for her position) and the majority (which provides no analysis for its contrary position), I have not yet reached a conclusion concerning what is required by the constitution or the court rules in these regards. I do, however, share Justice CORRIGAN's concerns about the propriety of the procedures followed by the majority in its determination to resolve these issues by December 31, 2010. See also *Mich Ed Ass'n v Secretary of State*, 488 Mich 18, 64-68 (2010) (MARKMAN, J., dissenting). Therefore, because I believe that defendants' motion, which we just received on December 28, 2010, raises legal issues of first impression, and because there are no emergency circumstances present here that require us to decide these issues within 48 hours of the motion, I would direct the parties to brief these issues and direct the clerk to schedule oral argument at the earliest opportunity.

Concerning the majority's assertion that "[n]o motion for reconsideration of this order will be entertained," we remind the majority that, while it may bind this Court by its substantive decisions, it does not bind by its pronouncements as to controversies that have not yet been presented to the Court, i.e., motions for reconsideration that have not yet been filed. That is not how this Court's "judicial power" is exercised.

Finally, with regard to the underlying motion for reconsideration in this case, I reaffirm my concern in allowing plaintiffs' class action to proceed. In particular, I reaffirm my concern that plaintiffs' claims (a) threaten to have the judiciary override, and assume ongoing control, of Michigan's system of local control and funding of legal services for indigent defendants, despite the absence here of any constitutional violation; (b) threaten, in the words of the Court of Appeals, "a cessation of criminal prosecutions against indigent defendants," *Duncan v Michigan*, 284 Mich App 246, 273 (2009); and (c) extend an open invitation to Michigan trial courts to assume ongoing operational control over the systems for providing defense counsel to indigent defendants in Berrien, Genesee, and Muskegon counties, and with that an invitation to compel state legislative appropriations, and executive branch acquiescence in such appropriations, in assuming similar judicial control over the criminal justice systems in every county of this state, while nullifying provisions of the criminal defense act and superseding the authority of the Supreme Court and the State Court Administrator.

YOUNG, J., joined the statement of MARKMAN, J.

COUNTY ROAD ASSOCIATION OF MICHIGAN v GOVERNOR, Nos. 140627 and 140628; reported below: 287 Mich App 95. Leave to appeal denied at 488 Mich 877.

KELLY, C.J., and CAVANAGH, J., would grant reconsideration.

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

Appeal Dismissed on Stipulation December 29, 2010:

COLAIANNI v STUART FRANKEL DEVELOPMENT CORPORATION, INCORPORATED, No. 139350; Court of Appeals No. 282587. Leave to appeal granted at 485 Mich 1070.

Order Denying Motion Entered December 29, 2010:

DUNCAN v STATE OF MICHIGAN, Nos. 139345, 139346, and 139347; reported below: 284 Mich App 246. Summary disposition at 486 Mich 906; reconsideration granted and summary disposition at 486 Mich 1071; reconsideration granted and order reinstated at 488 Mich 957; reconsideration denied at 488 Mich 1011.

[By order entered January 13, 2011, the Supreme Court directed that its December 29, 2010, order be published as follows—REPORTER.]

On order of the Court, the motion to deem this Court's release of Chief Justice KELLY's, Justice CORRIGAN's, and Justice MARKMAN's statements on December 22, 2010,* to be the Court's final order is considered, and it is denied.

The motion was untimely because it was filed December 28, 2010. The statements issued on December 22 did not constitute an order and did not modify the substance of the November 30, 2010, order of the Court. Pursuant to MCR 7.313(E), the period for reconsideration expired December 21, 2010, which was 21 days after November 30, 2010, the date of the Court's order. An order is effective on the date it is entered, except in circumstances not applicable here. See MCR 7.317(D).

Defendants' claim that they did not have the benefit of this Court's full reasoning until December 22 is incorrect. Concurring and dissenting statements are not binding authority and do not speak for the Court. They convey the reasoning of the individual justices who sign them, not the reasoning of the Court.

No motion for reconsideration of this order will be entertained.

MARILYN KELLY, C.J. (*concurring in part and dissenting in part*). Justice CORRIGAN's dissenting statement repeats her belief that "counsel for a losing party cannot properly decide whether to file a motion for reconsideration or [decide] what to include in such a motion without knowing where the entire Court stands on an issue." I disagree. Although knowing how all the justices stand is sometimes helpful, often it is not. And, regardless of whether it is or is not helpful, parties often must decide whether to file a motion for reconsideration without such knowledge.

---

* See 488 Mich 957, 960-967 (2010)—REPORTER.

For example, consider cases in which blanket denial orders enter, stating only that "we are not persuaded that the question presented should be reviewed by this Court." We often issue such orders without additional comment irrespective of the fact that the vote in favor of the order is not unanimous. Indeed, only a minority of our orders disposing of cases include statements. And even when they do, the statements do not speak for the Court.

Moreover, Justice CORRIGAN's argument that releasing an order without a justice's statement contravenes art 6, § 6 of the Michigan Constitution cannot be correct. First, taken to its logical conclusion, her interpretation would require a dissenting justice to write a statement of his or her reasons for dissenting in every case in which the Court lacks unanimity. This would include every case in which the Court's vote is split, but the justices whose views did not prevail decline to have their position shown on the order. Given the inevitable frequent disagreement among the justices on our Court, we would be quickly bogged down writing statements if Justice CORRIGAN's interpretation of our Constitution were correct.

Second, nothing in art 6, § 6 requires that the reasons for a dissent must be issued simultaneously with the Court's order. It does not "benefit" a losing party to have the reasoning in any one justice's statement in order to persuade the other justices because they have already had an opportunity to consider those arguments. In this case, Justice CORRIGAN's statement of December 22, 2010, and her statement issued today are almost verbatim restatements of the reasoning set forth in defendants' briefing to this Court; they do not provide independent reasoning to support defendants' position. Thus, defendants were themselves already aware of, and had already set forth, the arguments advanced in Justice CORRIGAN's dissenting statements.

Finally, no precedent exists for updating an order's entry date to the date of later-issued statements about that order. Always in the past, the statements have been treated as amendments or additions to the original order. The order became effective on the date it was entered, and later-issued statements have not affected that date. See *People v Limmer*, 461 Mich 974 (2000); MCR 7.317(D).

In *Limmer*, we issued an order on March 8, 2000, denying leave to appeal but stating that then-Chief Justice WEAVER and Justices CORRIGAN and MARKMAN would have granted leave to appeal and dissenting statements would follow. On April 18, 2000, a dissenting statement by Justice CORRIGAN, joined by then-Chief Justice WEAVER and Justice MARKMAN was issued.** The effective date of the denial order continued to be March 8.[1]

** The full text of the *Limmer* orders was not published in the *Michigan Reports*, but the orders were published at 609 NW2d 193 and 612 NW2d 395—REPORTER.

[1] See also Administrative Order No. 2006-8, 477 Mich clii (2006) (stating that the order was entered December 6, 2006, and became effective immediately and stating that dissenting statements would follow; then-Justice WEAVER's dissenting statement entered on December

For these reasons, we should not treat the date of issuance of our December 29 order as having been changed by today's issuance of Justice CORRIGAN's dissenting statement.

CORRIGAN, J. (*dissenting*). I dissent from the order denying defendants' motion to deem the December 22, 2010, order as this Court's final order. Defendants filed this motion on December 28, 2010, after the Court had issued on December 22, 2010, Chief Justice KELLY's concurring statement and Justice MARKMAN's and my dissenting statements to the Court's November 30, 2010, order granting plaintiffs' motion for reconsideration. The majority summarily denied defendants' motion to deem on December 29, 2010, without my dissenting statement. On the same day, the majority also denied defendants' motion for reconsideration of the November 30, 2010, order, to which I also dissented. See *Duncan v Michigan*, 488 Mich 1011, 1011-1017 (2010).

In my dissenting statement to the denial of defendants' motion for reconsideration of the November 30, 2010, order, I opined that the majority erroneously denied defendants' motion for reconsideration because that motion had been filed without the full reasoning of the Court. Specifically, I stated:

> My dissenting statement was not issued until December 22, 2010, which was one day after defendants were forced into filing their motion for reconsideration on December 21, 2010, in order to satisfy the 21-day deadline for motions for reconsideration. See MCR 7.313(E). Thus, defendants had to file their motion without having the opportunity to review and assess my dissenting statement. This wrongly deprived them of an opportunity to consider the thinking of the full Court, in violation of our state constitution. [*Id.* at 1012-1013 (CORRIGAN, J. dissenting).]

Recognizing this error, defendants asked that the December 22, 2010, order serve as the final order granting plaintiffs' motion for reconsideration and that the 21-day time period for filing a motion for reconsideration run from December 22, 2010. They also sought to withdraw their December 21, 2010, motion for reconsideration and submit a new filing or supplement to their motion. Defendants argue that because of the release of additional statements on December 22, 2010, they lacked the complete reasoning of the Court and the opportunity to review the basis for the decision by each justice.

I agree with defendants' argument. I would grant their requested relief. Our court rules cannot control this situation because defendants were forced to file their motion for reconsideration without the full reasoning of this Court, contrary to our state constitution. It is axiomatic that our court rules cannot contravene our state constitution. As I stated in my dissent to the order denying defendants' motion for reconsideration of the November 30, 2010, order:

> [O]ur state constitution provides:

20, 2006, but, as in *Limmer*, did not affect the effective date of the order).

> "Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. *When a judge dissents in whole or in part he shall give in writing the reasons for his dissent*." [Const 1963, art 6, § 6 (emphasis added).]

The majority contravenes this constitutional mandate by deciding a motion filed prior to the issuance of my constitutionally required reasons for dissenting. In my view, that my dissent has since been issued does not satisfy this provision because defendants had to file their motion prior to the issuance of my dissent in order to be timely under MCR 7.313(E). Thus, the majority has diminished the protection of this constitutional provision by implementing a timeline that required defendants to file any motion for reconsideration without the benefit of my dissent. Further, "to act with speed can only be countenanced in situations where [this Court] nonetheless satisfies its duty [under Const 1963, art 6, § 6] . . . ." *Lee v City of Utica*, 83 Mich App 679, 684 n 2 (1978) (RILEY, P.J., dissenting) (discussing this Court's use of peremptory orders). The majority's haste has thus undermined our duty under our state constitution.

I believe that counsel for a losing party cannot properly decide whether to file a motion for reconsideration or what to include in such a motion without knowing where the entire Court stands on an issue. This necessarily includes having an opportunity to evaluate each justice's position. Moreover, such an evaluation can only be made after each justice has fully enunciated his or her position. Here, the majority's calculated handling of this case deprived the litigants of the reasoning of the full Court.

The majority's lack of restraint is especially troubling given that the electorate already decided on a newly composed Court in the November 2, 2010, election. Undaunted, the majority, now paced by the calendar alone, is content in its attempt to foreclose reconsideration. I believe that the majority's handling of this case belies the way an appellate court should function. Appellate courts should be marked by steadiness and consistency, not gamesmanship in a race against the clock.

Further, I believe that defendants could properly move to file a supplement to their current motion or again move for reconsideration despite the language of MCR 7.313(E). Specifically, MCR 7.313(E) provides that "[t]he clerk shall refuse to accept for filing any motion for reconsideration of an order denying a motion for reconsideration." It is axiomatic that our court rules cannot contravene our state constitution. Thus, the procedural bar in MCR 7.313(E) cannot properly be applied here, where defendants were forced to file their motion for reconsideration without the full thinking of the Court, contrary to our state constitution, Const 1963, art 6, § 6. [*Id*. at 1013-1014.]

I disagree with the majority's assertion that because "[c]oncurring and dissenting statements are not binding authority and do not speak for the Court," defendants incorrectly posit that they lacked the reasoning of the full Court until December 22, 2010. Although such statements are not binding, this does not absolve the majority of the constitutional error described above. Further, to remedy this Court's noncompliance, we should deem our December 22, 2010, order as the final order and permit defendants to supplement their current motion or file an additional motion.

Lastly, regarding the majority's pronouncement that "[n]o motion for reconsideration of this order will be entertained," I agree with Justice MARKMAN, who properly states in his dissenting statement:

> [W]e remind the majority that, while it may bind this Court by its substantive decisions, it does not bind by its pronouncements as to controversies that have not yet been presented to the Court, i.e., motions for reconsideration that have not yet been filed. That is not how this Court's "judicial power" is exercised.

Although the majority provides no authority whatsoever for its pronouncement, MCR 7.313(E) would not bar defendants from filing a motion for reconsideration of this order. The court rule bars "motion[s] for reconsideration of an order denying a motion for reconsideration." Because the order at issue does not deny a motion for reconsideration, the procedural bar of MCR 7.313(E) is simply irrelevant. Accordingly, I would grant defendants the relief they requested.

MARKMAN, J. (*dissenting*). I dissent from the order denying defendants' motion for reconsideration and defendants' motion to deem the December 22, 2010, order as the Court's final order. For the reasons stated in my statements of July 16, 2010, and November 30, 2010, I would grant defendants' motion for reconsideration, vacate this Court's order granting plaintiffs' motion for reconsideration, and reinstate this Court's July 16, 2010, order.

The procedural history of this case is unusual and raises legal issues of first impression. One such issue is whether, as Justice CORRIGAN argues, parties have a constitutional right to have dissents considered before having to file a motion for reconsideration. See Const 1963, art 6, § 6 ("When a judge dissents in whole or in part he shall give in writing the reasons for his dissent."). Here, given that Justice CORRIGAN's dissent was not issued until December 22, 2010, (with the issuance of her statement having been expressly contemplated by what this Court issued on November 30, 2010), defendants were never afforded such an opportunity.

Put another way, is a party entitled to assess whether to file a motion for reconsideration, and how most effectively to fashion his or her arguments in support of such a motion, only after having been fully apprised of where the entire "court" stands on the underlying issue, as opposed only to where some individual justices stand? Related to this, before a motion for reconsideration must be filed, is a party entitled to have the arguments of dissenting justices considered by the majority, so that the majority may possibly be persuaded by such arguments? Thus, the decisive issue of first impression—were defendants here required to

file their motion for reconsideration within 21 days of November 30, 2010, or within 21 days of December 22, 2010?

These questions must be considered both in the context of the constitution, as Justice CORRIGAN asserts, and in the context of the court rules themselves. See MCR 7.313(E). In addition, assuming that either of these sources of the law affords a party the right to consider dissenting statements before being required to file a motion for reconsideration, what is the proper remedy where this right has not been afforded?

Unlike Justice CORRIGAN (who provides analysis for her position) and the majority (which provides no analysis for its contrary position), I have not yet reached a conclusion concerning what is required by the constitution or the court rules in these regards. I do, however, share Justice CORRIGAN's concerns about the propriety of the procedures followed by the majority in its determination to resolve these issues by December 31, 2010. See also, *Mich Ed Ass'n v Secretary of State*, 488 Mich 18, 64-68 (2010) (MARKMAN, J., dissenting). Therefore, because I believe that defendants' motion, which we just received on December 28, 2010, raises legal issues of first impression, and because there are no emergency circumstances present here that require us to decide these issues within 48 hours of the motion, I would direct the parties to brief these issues and direct the clerk to schedule oral argument at the earliest opportunity.

Concerning the majority's assertion that "[n]o motion for reconsideration of this order will be entertained," we remind the majority that, while it may bind this Court by its substantive decisions, it does not bind by its pronouncements as to controversies that have not yet been presented to the Court, i.e., motions for reconsideration that have not yet been filed. That is not how this Court's "judicial power" is exercised.

Finally, with regard to the underlying motion for reconsideration in this case, I reaffirm my concern in allowing plaintiffs' class action to proceed. In particular, I reaffirm my concern that plaintiffs' claims (a) threaten to have the judiciary override, and assume ongoing control, of Michigan's system of local control and funding of legal services for indigent defendants, despite the absence here of any constitutional violation; (b) threaten, in the words of the Court of Appeals, "a cessation of criminal prosecutions against indigent defendants," *Duncan v Michigan*, 284 Mich App 246, 273 (2009); and (c) extend an open invitation to Michigan trial courts to assume ongoing operational control over the systems for providing defense counsel to indigent defendants in Berrien, Genesee, and Muskegon counties, and with that an invitation to compel state legislative appropriations, and executive branch acquiescence in such appropriations, in assuming similar judicial control over the criminal justice systems in every county of this state, while nullifying provisions of the criminal defense act and superseding the authority of the Supreme Court and the State Court Administrator.

YOUNG, J., joined the statement of MARKMAN, J.

MARY BETH KELLY, J. Pursuant to MCR 2.003(D)(3)(b), I am not participating in this decision because it involves the republication of an order that has already been issued.***

*** Justice MARY BETH KELLY's statement related to the January 13, 2012, order directing the publication of the December 29, 2011, order—REPORTER.

Statement Regarding Decision on Motion for Disqualification Entered January 10, 2011:

PEOPLE v TERRY, No. 141983; Court of Appeals No. 292734.

YOUNG, C.J. I deny defendant's motion seeking my disqualification. Defendant's asserted basis for my recusal is predicated solely on statements made in political ads or press releases issued by the Republican Party. None of these statements were authorized by me or even known to me until they were released. I have never assented to or affirmed the assertions contained therein. Rather, I have taken an oath to support the federal and Michigan constitutions. I am and have always been committed to doing so.

There being no basis for my recusal, I deny the motion to disqualify.

Leave to Appeal Denied January 12, 2011:

PEOPLE v KOMOLMIS, No. 142374; Court of Appeals No. 300811.

Summary Disposition January 13, 2011:

ADER v DELTA COLLEGE BOARD OF TRUSTEES, No. 141540; Court of Appeals No. 290583. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010).

YOUNG, C.J. (*concurring*). Although I recognize that this Court's decision in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010) (*LSEA*), now provides the standard that courts should use to determine whether a party to an action has standing, I continue to adhere to the position stated in Justice CORRIGAN's dissenting opinion in that case that Michigan's standing doctrine is constitutionally based and that *LSEA* provides no meaningful standard to enforce these constitutional limits whatsoever. Cf. *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280 (2007); *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608 (2004); and *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 (2001).

CORRIGAN and MARKMAN, JJ., joined the statement of YOUNG, C.J.

CROWN ENTERPRISES, INCORPORATED v CITY OF ROMULUS, No. 141692; Court of Appeals No. 286525. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals on the issue of the abandonment of an easement for the reasons stated in the Court of Appeals concurring opinion and on the issue of the overburdening of a servient estate. While the Court of Appeals was correct that the plaintiff's use of the easement overburdened the servient estate, it provided no support for the proposition that such an act results in an automatic extinguishing of the easement right when the owner of the servient estate is not the complaining party. Therefore, we reinstate the decision of the Wayne Circuit Court that the plaintiff had an

easement right in Harrison Road, that the defendant interfered with that right without notice and an opportunity to be heard, and that, as a consequence, the plaintiff's due process rights were violated. In addition, we remand this case to the Court of Appeals for consideration of whether the award of attorney fees under 42 USC 1988 was reasonable under all the circumstances of this case. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

HEALING PLACE, LTD v FARM BUREAU MUTUAL INSURANCE COMPANY, No. 141753; Court of Appeals No. 286050. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals that reversed the Oakland Circuit Court's grant of summary disposition to the defendant regarding adult foster care services, for the reasons stated in the Court of Appeals partial dissenting opinion, and we remand this case to the trial court for further proceedings not inconsistent with this order.

HATHAWAY, J., would deny leave to appeal.

Leave to Appeal Denied January 13, 2011:

FORD MOTOR COMPANY v DEPARTMENT OF TREASURY, No. 141332; reported below 288 Mich App 491.

HENRY FORD HEALTH SYSTEM v ESURANCE INSURANCE COMPANY, No. 141448; reported below: 288 Mich App 593.

MARKMAN, J. (*concurring*). The result here—in which defendant insurance company is required to provide no-fault benefits to a passenger who was riding in a vehicle insured by defendant when it was obviously stolen—is deeply troubling, but I agree with this Court, and with the Court of Appeals, that the law as it now stands compels this result. However, while I am bound to follow this law, I take this opportunity to express my concerns. Under MCL 500.3113(a), a person, such as the injured person in this case, who has no insurance, and who was knowingly riding in a stolen vehicle driven by a person without a driver's license while under the influence of alcohol, is entitled to no-fault benefits from the insurer of the stolen vehicle. Moreover, under this same provision, there is confusion as to whether an injured person who *himself* takes a vehicle without permission, and who drives it without insurance and without a valid license, and who drives it while intoxicated, is entitled to no-fault benefits. Compare *Amerisure Ins Co v Plumb*, 282 Mich App 417 (2009), lv den 485 Mich 909 (2009), with *Farmers Ins Exch v Young*, 488 Mich 980 (directing oral argument on whether to grant the application). See, also, *Budget Rent-A-Car Sys v Detroit*, 482 Mich 1098 (2008), in which this Court affirmed an award of no-fault benefits to a fleeing felon who had used his car as a shield while aiming a firearm at a pursuing police officer. Coverage in these and similar situations, in my judgment, goes far beyond the scope of what an insurer reasonably bargains for when it enters into a policy with the owner of a vehicle, and responsible citizens will inevitably pay these costs through higher premiums. If the coverage in these cases is what is intended by the

Legislature, I must defer to its judgment; if, however, it is not, the Legislature should take clear notice that no-fault benefits are now recoverable even by persons whose "fault" pertains to theft, carjacking, and shootouts with the police, rather than "fault" pertaining only to negligent or careless driving of a motor vehicle.

YOUNG, C.J., and CORRIGAN and MARY BETH KELLY, JJ., joined the statement of MARKMAN, J.

JEDRZEJAS v GENESYS REGIONAL MEDICAL CENTER, No. 141520; Court of Appeals No. 291327.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

MCMANUS v TOLER, No. 141634; reported below: 289 Mich App 283.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v PAYNE, No. 141681; Court of Appeals No. 289824.

CAVANAGH and MARILYN KELLY, JJ., would grant leave to appeal.

PEOPLE v CASEY, No. 141748; Court of Appeals No. 298563.

PEOPLE v SANDOVAL-CERON, No. 141824; Court of Appeals No. 286985.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

DAVENPORT v MOSHOLDER, No. 141933; Court of Appeals No. 295852.

MARILYN KELLY, J. (*dissenting*). I would grant plaintiff's application for leave to appeal. This case involves a jurisprudentially significant legal question that recurs often, thus warranting the Court's consideration. Accordingly, I dissent from the order denying leave to appeal.

FACTS AND PROCEEDINGS

The parties to this case were married in 2001 and had a son (M) in 2002. In 2006, they divorced. The divorce judgment awarded them joint physical and joint legal custody of M. M generally spent approximately 225 overnights with plaintiff-mother and 140 with defendant-father.

In August 2008, plaintiff sought sole physical and legal custody of M. The trial court denied that request. About five weeks later, plaintiff filed a petition to change M's legal residence to Georgia, where she planned to move with him. Defendant objected to the move. A conciliator met with the parties in April 2009 and recommended that the court deny the petition. Plaintiff objected to several of the conciliator's findings, which led to an evidentiary hearing before a referee in August and September 2009. In October 2009, the referee issued a recommendation that the court deny plaintiff's petition. The referee also determined that an established custodial environment existed with both parties and that the move would change M's custodial environment with his father. Finally, the referee found that

plaintiff had failed to show by clear and convincing evidence that it was in M's best interests to change his established custodial environment.

The trial court conducted a hearing, after which it issued an opinion and order granting plaintiff's motion to change M's domicile. The court weighed three of the five factors in MCL 722.31, finding two inapplicable. It determined that plaintiff had shown by a preponderance of the evidence that the change of legal residence should be granted. The court also concluded that the move would not alter M's established custodial environment, so it was unnecessary to make a best-interests determination. The trial court based its conclusion on the facts that (1) once M was in Georgia, defendant would have the opportunity to exercise 138 overnights with M, which is nearly the same number as before the move, and (2) M would have open access to both parents and both parents would have open access to him, and they would provide him with continued security and stability.

Defendant appealed in the Court of Appeals, which reversed the trial court's decision. The majority, as well as concurring/dissenting Judge ZAHRA, agreed that the trial court erred by finding that the move from Michigan to Georgia would not change M's established custodial environment. All three judges concluded that the move "would disrupt the child's ready access to his father and impair the child's ability to receive guidance, structure, and comfort from his father."[1] This was true notwithstanding the fact that defendant's parenting time would remain roughly the same and that M would have the ability to communicate with defendant using a webcam.

Therefore, the majority remanded for a reevaluation of plaintiff's petition under the clear and convincing evidence standard. Judge ZAHRA wrote separately to state that he would reverse and remand with instructions that the petition to change M's legal residence be denied. Plaintiff filed an application for leave to appeal in this Court.

MODIFYING AN ESTABLISHED CUSTODIAL ENVIRONMENT

Plaintiff challenges the Court of Appeals conclusion that the proposed move would alter M's established custodial environment with his father. MCL 722.27(1)(c) states that an "established custodial environment" exists "if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." The statute further directs that "[t]he age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered." Finally, the statute mandates that a court "shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial

[1] *Davenport v Mosholder*, unpublished opinion per curiam of the Court of Appeals, issued September 9, 2010 (Docket No. 295852), p 4.

environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child."

WHAT IS THE PROPER ANALYSIS FOR APPLYING MCL 722.27(1)(c)?

This case offers the Court an opportunity to clarify when an established custodial environment is modified. The legal and practical implications of the issue are substantial. When the grant of a petition would modify a child's established custodial environment, the petitioner must meet the demanding "clear and convincing" evidentiary standard in MCL 722.27(1)(c). If the grant would not change an established custodial environment, the burden of proof needed is considerably lighter.[2]

This case raises several important subsidiary questions related to the issue. First, under what circumstances does a long-distance move not modify a child's established custodial environment with a non-moving parent? Here, the trial court apparently gave great weight to the fact that the amount of time M would have access to his father would not be significantly changed by the proposed move. The Court of Appeals noted that the move would change the quality of the time and interaction M would have with his father. Moreover, its holding suggests that the relocation itself may change the established custodial environment, regardless of whether the amount of parenting time changes. This proposition is arguably more faithful to the statutory language. Nothing in MCL 722.27(1)(c) explicitly references parenting time as the primary, or even a relevant, consideration in assessing whether an established custodial environment exists.[3] But a child's "physical environment" is an enumerated consideration.

Secondly, the contemporary widespread availability of technological devices allowing instantaneous communication, such as a webcam, gives rise to another interesting question that warrants this Court's consideration. Live communication technology is becoming increasingly prolific in our everyday lives. Yet, can such contact substitute for face-to-face interaction between parents and children? Was the Court of Appeals majority correct to conclude that, notwithstanding the use of a webcam, it would not be possible for the established custodial environment to remain unmodified after M moved from Michigan to Georgia?

Because this case involves several questions of legal significance for parents and children that this Court should address, I would grant leave to appeal.

MARY BETH KELLY, J., did not participate.

---

[2] The parent seeking the move must merely meet a preponderance of the evidence standard.

[3] See also *Pierron v Pierron*, 486 Mich 81, 86 (2010) ("If the required parenting time adjustments will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed."), citing *Brown v Loveman*, 260 Mich App 576, 595-596.

PSCHIGODA v DOOLEN, No. 142126; Court of Appeals No. 296157.

In re DUDLEY, No. 142308; Court of Appeals No. 298017.

CORRIGAN, J., not participating.

Reconsideration Denied January 13, 2011:

HORVATH v JOHNSON, Nos. 139996 and 139997; Court of Appeals Nos. 283931 and 284842. Leave to appeal denied at 488 Mich 968. The motion for reconsideration of this Court's November 30, 2010, order is considered, and it is denied, there being no majority in favor of granting reconsideration.

YOUNG, C.J., and CORRIGAN and MARKMAN, JJ., would grant reconsideration for the reasons set forth in Justice CORRIGAN's dissenting statement in this case. 488 Mich 968, 968-970 (2010).

MARY BETH KELLY, J., not participating.

PEOPLE v ANTHONY JONES, No. 140303; Court of Appeals No. 293725. Leave to appeal denied at 488 Mich 852.

CAVANAGH and MARILYN KELLY, JJ., would grant reconsideration and, on reconsideration, would grant leave to appeal.

MCCARTHY v SCOFIELD, No. 140328; Court of Appeals No. 284129. Leave to appeal denied at 486 Mich 939.

MARILYN KELLY, J., would grant reconsideration.

CORRIGAN, J., would impose sanctions.

MARY BETH KELLY, J., not participating.

MCCARTHY v SOSNICK, Nos. 141439 and 141440; Court of Appeals Nos. 293482 and 293483. Leave to appeal denied at 488 Mich 858.

MARY BETH KELLY, J., not participating.

MCCARTHY v SOSNICK, Nos. 141442 and 141443; Court of Appeals Nos. 294383 and 294385. Leave to appeal denied at 488 Mich 858.

MARY BETH KELLY, J., not participating.

Order Denying Motion for Disqualification Entered January 13, 2011:

MCCARTHY v SOSNICK, Nos. 141439 and 141440; Court of Appeals Nos. 293482 and 293483. The motion for full-Court consideration of the motion for disqualification of the entire bench is considered, and it is granted. Upon full-Court consideration of the plaintiff's motion, we deny the plaintiff's motion to disqualify the entire bench for the reason that no justice is persuaded that there is any ground for disqualification of any other justice. The motion for oral argument regarding disqualification is denied.

YOUNG, C.J. I do not participate in the order or the Court's decision-making under the new rule for the reasons stated in my November 25, 2009, dissent from the rule's promulgation.[1]

CORRIGAN, J. I do not participate in deciding the motion for full-Court review under the new version of MCR 2.003 for the reasons stated in my

---

[1] See 485 Mich cxxx, clxvii-clxxxv (2009) (YOUNG, J., dissenting).

November 25, 2009, dissent from the rule's promulgation.[1]

MARY BETH KELLY, J., not participating.

Leave to Appeal Granted January 21, 2011:

PEOPLE v GRISSOM, No. 140147; Court of Appeals No. 274148. The parties shall include among the issues to be briefed (1) whether, and under what circumstances, newly discovered impeachment evidence can be grounds for a new trial, see generally *People v Barbara*, 400 Mich 352, 363 (1977), and (2) if impeachment evidence can be grounds for a new trial, whether the defendant would have had a "reasonably likely chance of acquittal." MCR 6.508(D)(3)(b)(i).

We further order the St. Clair Circuit Court to appoint the State Appellate Defender Office to represent the defendant in this Court.

Leave to Appeal Denied January 26, 2011:

JONES-COLLIER v CUNNINGHAM, No. 141665; Court of Appeals No. 289915.

JONES-COLLIER v CUNNINGHAM, No. 142289; Court of Appeals No. 300884.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

SEXTON-O'BRIEN v NATIONWIDE INSURANCE COMPANY, No. 142322; Court of Appeals No. 300344.

Summary Disposition January 28, 2011:

PEOPLE v JOHN JONES, No. 139833; Court of Appeals No. 284670. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the April 3, 2008, order of the Wayne Circuit Court granting the defendant credit for time served. The defendant absconded on bond pending appeal after he was sentenced and was arrested on the outstanding warrant by federal authorities, who also held him to answer for federal crimes. The prosecution concedes that the federal sentence ultimately imposed for those charges is concurrent to the defendant's sentence in this case. Significantly, the trial court awarded the defendant credit only for time served after sentencing, while held in federal custody. Although he had absconded on bond, once he was taken into custody, he began serving his sentence in this case immediately. See *People v Gallagher*, 404 Mich 429, 439 (1979), and *In re Carey*, 372 Mich 378 (1964). Therefore, the date on which the defendant began serving his concurrent federal sentence is irrelevant, and he is entitled to credit for all time during which he was incarcerated after being sentenced in this case. Accordingly, we order the circuit court to amend the judgment of sentence to set the sentence to begin on May 12, 2006, the day the defendant was taken into federal custody on the warrant, plus four days of credit for time served before sentencing in 2000.

---

[1] See 485 Mich cxxx, cxlvi-clvii (2009) (CORRIGAN, J., dissenting).

In re INVESTIGATIVE SUBPOENAS, Nos. 140297 and 140299; reported below: 286 Mich App 201. We vacate the November 19, 2009, judgment of the Court of Appeals because the case is moot in light of *Citizens United v Federal Election Comm'n*, 558 US ___; 130 S Ct 876; 175 L Ed 2d 753 (2010). In all other respects, the application for leave to appeal is dismissed.

Leave to Appeal Denied January 28, 2011:

PEOPLE v HAILEY, Nos. 140514 and 140515; Court of Appeals Nos. 276423 and 276904. Leave to appeal granted at 486 Mich 963.

PEOPLE v JEFF WASHINGTON, No. 141579; Court of Appeals No. 291217.

MARILYN KELLY, J. (*dissenting*). I would reverse the judgment of the Court of Appeals. I do not believe that the police made a valid *Terry*[1] stop in this case. Consequently, their search was illegal, and the trial court was correct to dismiss the case.

The underlying facts are as follows. While on patrol in a fully marked police car, Officer Williams noticed a green Buick parked on a side street in Flint. Defendant was standing near the passenger side window talking to the driver. Williams thought it looked "kind of suspicious, possibly some drug activity going on," so he turned the cruiser around and waited about a half block away to "see if the vehicle would leave."

Although he saw nothing to satisfy his hunch, Williams decided to approach the men to see what they were doing. He pulled his cruiser in front of the Buick and blocked it, completing a *Terry* stop.[2] When he searched defendant's jacket,[3] Williams discovered a firearm.

He arrested defendant and charged him with carrying a concealed weapon, felon in possession of a firearm, and felony-firearm. Defendant moved to suppress the gun on several bases. At the hearing on the motion, Williams was the only witness. Regarding the initial *Terry* stop, Williams conceded that he had no specific reason for believing that a drug transaction was occurring. It was just a hunch or a general suspicion. No drugs were discovered.

Terry mandates that, for police to justify intruding into a citizen's right against unlawful searches and seizures, officers must "be able to point to specific and articulable facts" warranting the intrusion.[4] "This demand for specificity in the information upon which police action is

---

[1] *Terry v Ohio*, 392 US 1 (1968).

[2] See, e.g., *United States v See*, 574 F3d 309, 313 (CA 6, 2009) (explaining that when a police officer blocks a citizen's car with the officer's car, it constitutes a warrantless *Terry* seizure because a reasonable person would not feel free to leave).

[3] At the time Williams blocked the Buick, defendant was sitting in the passenger seat.

[4] *Terry*, 392 US at 21.

predicated is the central teaching of this Court's Fourth Amendment jurisprudence."[5] "[I]narticulate hunches" are not enough.[6]

The absence of any "specific and articulable facts" justifying the *Terry* stop are evident from the following concessions: (1) Williams admitted that he never saw any exchange of money or material; (2) Williams could not tell if the Buick's window was up or down; and (3) no suspicious behavior occurred during the minutes Williams watched the men from a distance.

The stop cannot be justified by the fact that Williams saw defendant making furtive movements as he walked up to the Buick. Assuming *arguendo* that such movements would be sufficient to give rise to reasonable suspicion when he approached the Buick on foot, Williams had already completed the *Terry* stop. He did that by blocking the Buick with his patrol car. Reasonable suspicion acquired after the stop cannot justify a seizure that is unwarranted at the time of the stop.

The purpose of requiring "reasonable suspicion" before permitting police officers to make a *Terry* stop is to uphold a central purpose of the Fourth Amendment: preventing police from conducting arbitrary searches and seizures of citizens.[7] Here, all Officer Williams knew before he made the *Terry* stop was that two men were talking by a parked car in a high-crime area. By his own admission, Williams did not have a specific reason for suspecting drug activity, only a hunch or general suspicion. Yet despite his continued observation of the two men, nothing additional occurred to substantiate the officer's hunch. In short, no "specific and articulable facts" existed to justify the stop.

I would reverse the judgment of the Court of Appeals and reinstate the trial court's orders granting defendant's motion to suppress the gun and dismissing the case.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

WASHINGTON v ST JOHN HEALTH, No. 142381; Court of Appeals No. 301528.

Summary Disposition February 2, 2011:

PEOPLE v HAEGER, No. 141718, Court of Appeals No. 297099. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

---

[5] *Id.* at 21 n 18.

[6] *Id.* at 22.

[7] *Schmerber v California*, 384 US 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. . . . '[T]he security of one's privacy against arbitrary intrusion by the police' [is] 'at the core of the Fourth Amendment' and 'basic to a free society.' "), quoting *Wolf v Colorado*, 338 US 25, 27 (1949).

We further order that this case be argued and submitted to the Court of Appeals together with the case of *In re Parole of Elias* (Docket No. 142198), which we remanded to the Court of Appeals for consideration as on leave granted by order dated February 2, 2011, at such future session of the Court of Appeals as both cases are ready for submission.

We do not retain jurisdiction.

In re PAROLE OF ELIAS, No. 142198; Court of Appeals No. 300113. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

We further order that this case be argued and submitted to the Court of Appeals together with the case of *People v Haeger* (Docket No. 141718), which we remanded to the Court of Appeals for consideration as on leave granted by order dated February 2, 2011, at such future session of the Court of Appeals as both cases are ready for submission.

We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered February 2, 2011:

FINDLEY V DAIMLERCHRYSLER CORPORATION, No. 141858; reported below: 289 Mich App 483. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether the Workers' Compensation Appellate Commission is required to render a majority opinion in order to provide a final decision that is reviewable by the appellate courts.

Leave to Appeal Granted February 2, 2011:

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION V OFFICE OF FINANCIAL AND INSURANCE REGULATION, No. 141447; reported below: 288 Mich App 552. The parties shall address whether the Court of Appeals erred when it upheld the respondent commissioner's interpretation of MCL 500.2930a(1).

The motions to file briefs amicus curiae are granted. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE V ROSE, No. 141659; reported below: 289 Mich App 499. The parties shall address whether the use of a screen to shield a child complainant from the defendant during testimony violates the Confrontation Clause or prejudices the defendant because it impinges on the presumption of innocence.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

MILLER V CITIZENS INSURANCE COMPANY, No. 141747; reported below: 288 Mich App 424. The parties shall include among the issues to be briefed

(1) whether a medical care provider that is not a party to a fee agreement with plaintiff's counsel may be liable for all or a portion of counsel's fee and the basis for such liability, if any, and (2) if there is such liability, the manner in which the amount of the liability is to be determined.

The motions for leave to file briefs amicus curiae are granted. The Michigan Association for Justice and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied February 2, 2011:

BARACHKOV v 41-B DISTRICT COURT, No. 140938; Court of Appeals No. 284197.

MEREDITH v OAKWOOD HEALTHCARE, INCORPORATED, No. 141418; Court of Appeals No. 288507.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v TEALL, No. 141537; Court of Appeals No. 297983.

PEOPLE v RAYMOND WHITE, No. 141565; Court of Appeals No. 296203.

MARILYN KELLY, J., would grant leave to appeal.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v HAWKINS, No. 141658; Court of Appeals No. 290932.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

FLOWERS v PROGRESSIVE MICHIGAN INSURANCE COMPANY, No. 141684; Court of Appeals No. 291958.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

BURKE v UNITED AMERICAN ACQUISITIONS AND MANAGEMENT, INCORPORATED, No. 141754; Court of Appeals No. 290590.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v NICHOLSON, No. 141780; Court of Appeals No. 291851.

PEOPLE v ROGERS, No. 141796; Court of Appeals No. 291180.

PEOPLE v TONY HURD, No. 141802; Court of Appeals No. 291212.

MOOTHART v SECRETARY OF STATE, No. 141886; Court of Appeals No. 298462.

Reconsideration Denied February 2, 2011:

PEOPLE v MORRISON, No. 141079; Court of Appeals No. 285662. Leave to appeal denied at 487 Mich 858.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

Order on Complaint for Superintending Control Entered February 2, 2011:

TINDALL v ATTORNEY GRIEVANCE COMMISSION, No. 141515. The Grievance Administrator is directed to provide the plaintiff with a copy of the respondent attorney's answer, as well as a copy of the respondent's supporting documents, unless the administrator determines that there is cause for not disclosing some or all of the supporting documents.

Summary Disposition February 4, 2011:

JONES v DAIMLERCHRYSLER CORPORATION, No. 140889; reported below: 288 Mich App 99.

Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that portion of the Court of Appeals' decision reinstating one aspect of the plaintiffs' premises liability claim and we reinstate the summary disposition ruling of the Macomb Circuit Court. The defendant premises owner did not have a duty to protect the injured plaintiff, an employee of an independent contractor hired to perform construction work on the owner's premises, from the hazardous condition that contributed to the plaintiff's injury, where the defendant delegated to the contractor the task of performing the construction work. *Banaszak v Northwest Airlines, Inc*, 485 Mich 1038 (2010); *Young v Delcor Assoc*, 477 Mich 931 (2006). Moreover, even if premises liability had applied, the injured plaintiff could not have recovered where he was aware of the hazard, and indeed had ordered its creation. *Riddle v McLouth Steel Products Corp*, 440 Mich 85 (1992). The Court of Appeals' theory of liability based on the presence, location, and design of the hinged metal floor hatch lacks legal and factual merit. The plaintiff, who ordered the hatch to be opened, was not injured by the presence, location, and design of the hatch, but rather by falling through the hole that was created when the hatch was opened. An owner of property cannot be held liable under premises liability law for a design of the property that permits an invitee or person in control of the property to create a hazardous condition where none existed before.

MARILYN KELLY, J., would grant leave to appeal.

HATHAWAY, J., would deny leave to appeal.

Leave to Appeal Granted February 4, 2011:

JONES v DETROIT MEDICAL CENTER AND SINAI-GRACE HOSPITAL, Nos. 141624 and 141629; reported below: 288 Mich App 466. The parties shall include among the issues to be briefed (1) whether the probability of injury is a proper consideration in determining proximate causation and (2) whether partial summary disposition may be granted to the plaintiff with regard to proximate causation where the negligence of the defendant has not been established.

The Michigan Association for Justice and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied February 4, 2011:

DRAKE v CITY OF BENTON HARBOR, No. 140685; Court of Appeals No. 287502.

MARKMAN, J. (*dissenting*). The only issue in this case concerns whether a "championship Jack Nicklaus" privately owned golf course constitutes a "park use," consistent with J. N. and Carrie Klock's deed to the city of Benton Harbor of property to be designated as Jean Klock Park in memory of their daughter who had died in infancy. The city, having previously sold a portion of Jean Klock Park to a private developer for a residential housing development, now attempts to justify the use of a remaining portion of the park for a golf course on, among other grounds, "underutilization" of the park, "economic development," "jobs," and the establishment of a "tourist destination." However admirable these objectives, it is J. N. and Carrie Klock's intentions that control here, not those of the current city government, and the Klocks' intentions must control even if they are now viewed by the city as inconvenient to the pursuit of objectives preferred by the city. In my judgment, and for reasons that require little more than resort to the customary understanding of the term "park" by ordinary users of our language, I believe that the city's use of Jean Klock Park, by leasing portions of it for 105 years to a private commercial entity, the Harbor Shores Community Redevelopment, Inc., for its use as a golf course, constitutes a breach of faith with the Klocks, and should be enjoined. Although the city prevails today, it, and other communities throughout our state, may well come out losers tomorrow as later generations of philanthropists look at the legacy of J. N. and Carrie Klock and come to question the faithfulness of government in upholding *their* intentions after they too have passed. I respectfully dissent.

ADAIR v UTICA COMMUNITY SCHOOLS, No. 141296; Court of Appeals No. 288286. The application for leave to appeal the May 13, 2010, judgment of the Court of Appeals is considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

YOUNG, C.J., and MARKMAN and MARY BETH KELLY, JJ., would reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and remand this case to the Macomb Circuit Court for entry of a judgment consistent with that opinion.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v AKRAM, No. 141882; Court of Appeals No. 283161.

HATHAWAY, J. I recuse myself from this matter pursuant to MCR 2.003(C)(1)(a). I have previously expressed statements on the record as a circuit court judge that could demonstrate personal bias against defense trial counsel.

In re SMITH/TYSON MINORS, No. 142460; Court of Appeals No. 298141.

Leave to Appeal Denied February 7, 2011:

PEOPLE v WILKINSON, No. 139121; Court of Appeals No. 291724.

PEOPLE v TIRONI, No. 140465; Court of Appeals No. 293694.

PEOPLE v MICHAEL JOHNSON, No. 140751; Court of Appeals No. 295013.

PEOPLE v ALBERTA, No. 140952; Court of Appeals No. 296695.

AMERICAN HOME MORTGAGE SERVICING v PANKO, No. 140958; Court of Appeals No. 289585.

PEOPLE v ANDREW MILLER, No. 141250; Court of Appeals No. 286580.

PEOPLE v MERRIWEATHER, No. 141366; Court of Appeals No. 297210.

PEOPLE v MURRAY, No. 141371; Court of Appeals No. 296537.

PEOPLE v NATHANIEL SMITH, No. 141386; Court of Appeals No. 296120.

PEOPLE v KENNETH WILLIAMS, No. 141445; Court of Appeals No. 295249.

PEOPLE v CONKLIN, No. 141479; Court of Appeals No. 286270.

PEOPLE v RAYMOND MOORE, No. 141506; Court of Appeals No. 295940.

PEOPLE v PRYOR, No. 141529; Court of Appeals No. 296536.

PEOPLE v STEVEN WILLIAMS, No. 141543; Court of Appeals No. 296393.

PEOPLE v CORRION, No. 141550; Court of Appeals No. 298133.

PEOPLE v MCCLOUD, No. 141553; Court of Appeals No. 296967.

NATIONAL ASSOCIATION OF INVESTORS CORP v DOBSON-MCCOMBER AGENCY, INC, Nos. 141556, 141557, 141562, and 141563; Court of Appeals Nos. 286295 and 287701.

PEOPLE v MARTIN, No. 141574; Court of Appeals No. 298317.

PEOPLE v LUCERO, No. 141583; Court of Appeals No. 297011.

PEOPLE v WHITTAKER, No. 141590; Court of Appeals No. 296914.

PEOPLE v BANKS, No. 141591; Court of Appeals No. 298151.

PEOPLE v SHERROD, No. 141598; Court of Appeals No. 296895.

PEOPLE v MACK, No. 141601; Court of Appeals No. 290165.

PEOPLE v AMPARO, No. 141605; Court of Appeals No. 289955.

PEOPLE v GLOVER, No. 141608; Court of Appeals No. 296737.

PEOPLE v PETER RODRIGUEZ, No. 141627; Court of Appeals No. 290599.

PEOPLE v DARQUESE LEWIS, No. 141641; Court of Appeals No. 297072.

PEOPLE v JACK SMITH, No. 141643; Court of Appeals No. 297737.

PEOPLE v MAGEE, No. 141647; Court of Appeals No. 297073.

PEOPLE v SHANNON, No. 141662; Court of Appeals No. 297258.

FOWLER v JACK'S CORNER STORES, No. 141668; Court of Appeals No. 291020.

CAVANAGH, J., did not participate because of a familial relationship with counsel of record.

PATTERSON v CITIFINANCIAL MORTGAGE CORPORATION, No. 141670; reported below: 288 Mich App 526.

WELLS FARGO BANK, NA v COOPER, No. 141674; Court of Appeals No. 296792.

PEOPLE v BRADLEY, No. 141677; Court of Appeals No. 290353.

PEOPLE v PAUL HENDERSON, No. 141683; Court of Appeals No. 285331.

PEOPLE v EUGENE POSEY, No. 141688; Court of Appeals No. 291075.

PEOPLE v CHARLES SMITH, No. 141699; Court of Appeals No. 288595.

PEOPLE v PHLEGM, No. 141701; Court of Appeals No. 288622.

PEOPLE v ANTHONY TYLER, No. 141722; Court of Appeals No. 291631.

PEOPLE v LARRY LOVE, No. 141728; Court of Appeals No. 291845.

PEOPLE v GREER, No. 141735; Court of Appeals No. 286912.

PEOPLE v CELLEY, No. 141736; Court of Appeals No. 298907.

PEOPLE v LAFOREST, No. 141746; Court of Appeals No. 296836.

PEOPLE v LEROY TOWNSEND, No. 141750; Court of Appeals No. 291241.

PEOPLE v ELLIOTT, No. 141755; Court of Appeals No. 298885.

PEOPLE v VANDENBOSCH, No. 141756; Court of Appeals No. 298867.

PEOPLE v MASON, No. 141757; Court of Appeals No. 298499.

PEOPLE v KEITH CHAPMAN, No. 141758; Court of Appeals No. 291524.

GRIEVANCE ADMINISTRATOR v RADULOVICH, No. 141760.

PEOPLE v CHASE, No. 141762; Court of Appeals No. 290618.

PEOPLE v DIENHERT, No. 141763; Court of Appeals No. 285489.

PEOPLE v POWELL, No. 141772; Court of Appeals No. 296087.

STATE TREASURER v FENDER, No. 141776; Court of Appeals No. 299004.

PEOPLE v VONNELL REED, No. 141778; Court of Appeals No. 291405.

PEOPLE v GERMAINE JENKINS, No. 141787; Court of Appeals No. 290910.

PEOPLE v DAVID DAVIS, No. 141794; Court of Appeals No. 298681.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v RAIHALA, No. 141799; Court of Appeals No. 297684.

PEOPLE v RATLIFF, No. 141807; Court of Appeals No. 299314.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v JACKSON JACOBS, No. 141814; Court of Appeals No. 299152.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

AMERICAN HOME ASSURANCE COMPANY v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, No. 141817; reported below: 288 Mich App 706.

ACE AMERICAN HOME INSURANCE COMPANY v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, No. 141819; reported below: 288 Mich App 706.

MIKOLASIK v KANTROW, No. 141829; Court of Appeals No. 292005.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v HAYWARD, No. 141833; Court of Appeals No. 298207.

PEOPLE v GEORGE BROWN, No. 141835; Court of Appeals No. 298422.

PEOPLE v JOHNNIE TAYLOR, No. 141841; Court of Appeals No. 298836.

ALLARD v SOVA, No. 141844; Court of Appeals No. 285633.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DARROUGH, No. 141847; Court of Appeals No. 299037.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v CROSTHWAITE, No. 141848; Court of Appeals No. 291645.

PEOPLE v DITTA, No. 141851; Court of Appeals No. 289604.

PEOPLE v RICKY BUCHANAN, No. 141852; Court of Appeals No. 290942.

PEOPLE v CAMP, No. 141853; Court of Appeals No. 285101.

PEOPLE v GRIESEMER, No. 141860; Court of Appeals No. 288799.

PEOPLE v MALECKAS, No. 141862; Court of Appeals No. 299135.

PEOPLE v CHRISTOPHER SMITH, No. 141864; Court of Appeals No. 297435.

PEOPLE v BINYARD, No. 141866; Court of Appeals No. 290259.

PEOPLE v BOSSERT, No. 141873; Court of Appeals No. 291023.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v POYNTZ, No. 141876; Court of Appeals No. 299060.

PEOPLE v RADER, No. 141877; Court of Appeals No. 299017.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ANTHONY ALLEN, No. 141879; Court of Appeals No. 291334.

PEOPLE v ALBERS, No. 141880; Court of Appeals No. 298741.

SKRINE v VANDERBEEK, No. 141887; Court of Appeals No. 290469.

PEOPLE v WINDMON, No. 141890; Court of Appeals No. 291664.

PEOPLE v WILLS, No. 141891; Court of Appeals No. 297637.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v COCHES, No. 141892; Court of Appeals No. 299005.

EXECUTIVE PROPERTY DEVELOPMENT v NAUTILUS INSURANCE COMPANY, No. 141894; Court of Appeals No. 291368.

PEOPLE v TENORA BROOKS, No. 141895; Court of Appeals No. 287948.

PEOPLE v TACKETT, No. 141901; Court of Appeals No. 299119.

PEOPLE v RICE, No. 141903; Court of Appeals No. 291711.

PEOPLE v PAULEY, No. 141906; Court of Appeals No. 298812.

PEOPLE v TETREAU, No. 141907; Court of Appeals No. 291373.

PEOPLE v ZUAZO, No. 141913; Court of Appeals No. 299387.

PEOPLE v ROY HOLMES, No. 141922; Court of Appeals No. 299439.

PEOPLE v GERORD ROBINSON, No. 141923; Court of Appeals No. 287952.

PEOPLE v PIGGUE, No. 141925; Court of Appeals No. 299227.

PEOPLE v SOCORRO, No. 141926; Court of Appeals No. 297871.

PEOPLE v DARNELL DUNLAP, No. 141934; Court of Appeals No. 293013.

HANSKNECHT v CLEAR CHANNEL BROADCASTING, INC, No. 141935; Court of Appeals No. 297010.

PEOPLE BASSIN, Nos. 141938 and 141939; Court of Appeals Nos. 290473 and 295012.

PEOPLE v HOPKINS, No. 141941; Court of Appeals No. 286208.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v CORRION, No. 141949; Court of Appeals No. 300259.

PEOPLE v DROSTE, No. 141952; Court of Appeals No. 299277.

PEOPLE v COLOR MINI CAMERA, No. 141954; Court of Appeals No. 291418.

PEOPLE v ABDULLAH, No. 141963; Court of Appeals No. 291048.

ALLIANCE FOR CHILDREN, INC v DETROIT PUBLIC SCHOOLS, No. 141979; Court of Appeals No. 291926.

MOYER v COMPREHENSIVE REHABILITATION CENTER, INC, No. 141981; Court of Appeals No. 292061.

MCDONALD FORD, INC v CITIZENS BANK, No. 141984; Court of Appeals No. 296814.

PEOPLE v DESHAWN SMITH, No. 141989; Court of Appeals No. 299380.

PEOPLE v ZACHARY, No. 141990; Court of Appeals No. 290649.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v BRAKE, No. 141999; Court of Appeals No. 292313.

PEOPLE v DEBORAH ALLEN, No. 142002; Court of Appeals No. 292295.

PEOPLE v CORRION, No. 142042; Court of Appeals No. 299970.

PEOPLE v CAMINATA, No. 142192; Court of Appeals No. 293220.

Reconsideration Denied February 7, 2011:

CARLTON BROWN v DEPARTMENT OF CORRECTIONS, No. 141147; Court of Appeals No. 296305. Leave to appeal denied at 488 Mich 911.

PEOPLE v RONNIE WILLIAMS, No. 141466; Court of Appeals No. 297404. Leave to appeal denied at 488 Mich 948.

PEOPLE v VARTANIAN, No. 141623; Court of Appeals No. 291112. Leave to appeal denied at 488 Mich 873.

Superintending Control Denied February 7, 2011:

BROWN v ATTORNEY GRIEVANCE COMMISSION, No. 141839.

Leave to Appeal Denied February 18, 2011:

In re GELIL, No. 142464; Court of Appeals No. 298619.

In re PAYNE/DARLING/WRIGHT MINORS, No. 142480; Court of Appeals No. 297674.

Summary Disposition March 4, 2011:

SCHREUR v DEPARTMENT OF HUMAN SERVICES, No. 141777; reported below: 289 Mich App 1. Pursuant to MCR 7.302(H)(1), in lieu of granting leave

to appeal, we affirm the result reached by the Court of Appeals, but vacate that portion of the Court of Appeals' judgment that holds that "because [plaintiff] was an *applicant* for benefits, not a *recipient* of benefits, [defendant] was not required to cite the specific provision supporting its denial." Pursuant to 42 CFR 435.912, defendant was required to cite the specific provision supporting its denial. However, defendant's failure to cite the correct regulations on which its denial of benefits was based did not accord plaintiff the right to file her hearing request 368 days after the notice was mailed and 278 days after expiration of the 90-day hearing request period. The notice provided to plaintiff clearly explained why plaintiff was denied benefits, i.e., "because her disability was not 'expected to last for at least 12 consecutive months' and would not prevent her from 'working in any substantial gainful employment,' " and informed her that she had 90 days to request a hearing if she so desired. The fact that the wrong regulations were cited in this notice did not alter plaintiff's obligation, pursuant to 42 CFR 431.221(d), to request a hearing within 90 days. Plaintiff could have simply included an objection to those regulations in her request for a hearing. That is, while defendant's citation of the incorrect regulations may have provided plaintiff with an additional basis upon which to request a hearing, it did not afford plaintiff an indefinite period within which to request such a hearing.

MARILYN KELLY, J. (*dissenting*). I respectfully dissent from the order affirming the result reached by the Court of Appeals. I would grant leave to appeal.

The underlying facts are that plaintiff, Amanda Schreur, had surgery on her back to remove a tumor. On April 29, 2005, she applied for Medicaid disability benefits, claiming she was unable to work because of lower back pain and weakness. She further claimed that, because of her medical condition, her household lost its only source of income.

The Department of Human Services (DHS) denied her application for disability benefits on June 10, 2005. The denial notice stated that plaintiff was ineligible for Medicaid because her "impairment has not lasted nor is expected to last for at least 12 consecutive months and does not prevent working in any substantial gainful employment." It also stated that a hearing request must be made within 90 days.

Plaintiff submitted a hearing request on June 13, 2006—368 days after the date of the denial notice. Plaintiff claimed that her request was timely because the denial notice was defective. She argued that the notice did not trigger the 90-day period in which to request a hearing because it did not cite specific regulations on which the denial was based. The regulations it did cite were irrelevant to the denial of plaintiff's application.

On December 14, 2006, an administrative hearing was held on the timeliness of plaintiff's hearing request. The hearing referee rejected plaintiff's argument that DHS's failure to cite the correct regulations underlying its decision rendered the notice insufficient or defective. The referee reasoned that, although DHS had to cite the correct regulations in its decision, their omission constituted merely an additional ground on which to request a hearing contesting the decision. It did not "toll" the

90-day period. Accordingly, the referee issued an order dismissing plaintiff's request for a hearing as untimely.

Plaintiff appealed the dismissal in the Bay County Circuit Court, which agreed with her and held that her claim had been timely. It opined that the 90-day period "begins at the point when timely and adequate notice of denial has been provided to the applicant." The court concluded that, because the notice did not conform to the requirements of 42 CFR 431.210 and 42 CFR 431.221, the statutory 90-day period had not begun to run. The court thus reversed the referee's decision and reinstated plaintiff's request for a hearing on the substantive issue of whether she was disabled.

When DHS appealed the reinstatement to the Court of Appeals, the Court reversed the lower court decision and dismissed plaintiff's request for a hearing as untimely. It distinguished Medicaid applicants from Medicaid recipients and concluded that only recipients were entitled to notice of the specific regulations that support the action.

Plaintiff filed a motion for reconsideration, citing 42 CFR 435.912. That provision requires DHS to inform an applicant of the specific regulations supporting its denial. The motion also asserted that the Court of Appeals' opinion was erroneous because it was based on the premise that notice of the specific regulations supporting the denial was not essential. The Court of Appeals denied reconsideration on August 9, 2010.

The Court of Appeals' opinion is premised on its determination that DHS need not provide plaintiff with the specific regulations supporting its denial of her application. Plaintiff correctly argues that 42 CFR 435.912 requires a citation of the specific regulation.[1] Thus, the notice plaintiff received was deficient. However, because the Court of Appeals did not consider 42 CFR 435.912, it did not consider the effect of the deficiency. It did not resolve, as the circuit court did, whether the 90-day period is triggered only where timely and adequate notice of denial has been provided to the applicant.

This Court's order concludes, without explanation, that "[t]he fact that the wrong regulations were cited in this notice did not alter plaintiff's obligation . . . to request a hearing within 90 days." If the 90-day period runs from the date of a denial of benefits that fails to include the regulations relied on, does the applicant have adequate information to request a hearing? Will a request for a hearing citing only the failure to provide specific regulations result only in a denial that adds the necessary citation of regulations? Can the applicant then seek a hearing based on that denial?

I believe the issue presented in this case is significant enough to warrant full appellate review. This Court's order leaves important

---

[1] 42 CFR 435.912 provides: "The agency must send each applicant a written notice of the agency's decision on his application, and, if eligibility is denied, the reasons for the action, the specific regulation supporting the action, and an explanation of his right to request a hearing."

questions unanswered. I would grant leave to appeal to give plenary consideration to the application of 42 CFR 435.912 to the facts of this case.

HATHAWAY, J., would grant leave to appeal.

Leave to Appeal Denied March 8, 2011:

QUALITY MANUFACTURING, INC v MANN, No. 140811; Court of Appeals No. 286491.

PEOPLE v ERICKSEN, No. 141089; reported below: 288 Mich App 192.

PEOPLE v TONY BROWN, No. 141237; Court of Appeals No. 295563.

PEOPLE v ATKINS, No. 141267; Court of Appeals No. 295943.

PEOPLE v GONZALES, No. 141276; Court of Appeals No. 295462.

PEOPLE v NATHANIEL JENKINS, No. 141279; Court of Appeals No. 295375.

PEOPLE v SAMUEL JONES, No. 141349; Court of Appeals No. 296946.

PEOPLE v MOZINGO, No. 141363; Court of Appeals No. 295603.

PEOPLE v YOUNGER, No. 141370; Court of Appeals No. 296711.

PEOPLE v DONALD WILLIAMS, No. 141376; Court of Appeals No. 295937.

PEOPLE v ANTONIO BAILEY, No. 141379; Court of Appeals No. 296088.

PEOPLE v SWANIGAN, No. 141395; Court of Appeals No. 295230.

CHABAN v GETSINGER, No. 141398; Court of Appeals No. 282481.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v KEYES, No. 141402; Court of Appeals No. 297148.

PEOPLE v PENA, No. 141409; Court of Appeals No. 296995.

PEOPLE v BURLEY, No. 141516; Court of Appeals No. 296840.

PEOPLE v KANYAMA HAMPTON, No. 141517; Court of Appeals No. 296071.

PEOPLE v MEMMINGER, No. 141549; Court of Appeals No. 298024.

PEOPLE v STANLEY ST CLAIR, No. 141551; Court of Appeals No. 296548.

PEOPLE v JAYCE SMITH, No. 141566; Court of Appeals No. 297972.

AJAX PAVING INDUSTRIES v VANOPDENBOSCH CONSTRUCTION CO, No. 141569; reported below: 289 Mich App 639.

PEOPLE v DOWNS, No. 141580; Court of Appeals No. 296751.

PEOPLE v FOSTER, No. 141602; Court of Appeals No. 296742.

PEOPLE v GOSS, No. 141611; Court of Appeals No. 298744.

PEOPLE v KEYS, No. 141619; Court of Appeals No. 298280.

PEOPLE v DICKENS, No. 141640; Court of Appeals No. 296842.

PEOPLE v DOERS, No. 141644; Court of Appeals No. 288514.

PEOPLE v SIMPSON, No. 141652; Court of Appeals No. 297793.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v DERRICK SMITH, No. 141653; Court of Appeals No. 296869.

PEOPLE v RUCKER, No. 141678; Court of Appeals No. 298520.

PEOPLE v RAGLAND, No. 141690; Court of Appeals No. 296881.

PEOPLE v RHASHI HARRIS, No. 141697; Court of Appeals No. 296666.

PEOPLE v BRIAN JOHNSON, No. 141703; Court of Appeals No. 296736.

PEOPLE v DEJESUS, No. 141710; Court of Appeals No. 296473.

PEOPLE v DANIEL RODRIGUEZ, No. 141714; Court of Appeals No. 296900.

WASHTENAW COUNTY v AFSCME COUNCIL 25, No. 141719; Court of Appeals No. 286874.

PEOPLE v SCARBER, No. 141725; Court of Appeals No. 297365.

PEOPLE v AJENE JORDAN, No. 141737; Court of Appeals No. 297485.

PEOPLE v MIKEL POSEY, No. 141740; Court of Appeals No. 298847.

PEOPLE v TIPPINS, No. 141749; Court of Appeals No. 297051.

PEOPLE v SHAUN SCOTT, No. 141751; Court of Appeals No. 297380.

PEOPLE v ESCOBAR, No. 141759; Court of Appeals No. 296246.

PEOPLE v ERTMAN, No. 141764; Court of Appeals No. 298035.

PEOPLE v CHRISTOPHER MOORE, No. 141767; Court of Appeals No. 297519.

PEOPLE v BARRON, No. 141771; Court of Appeals No. 298580.

PEOPLE v NOVAK, No. 141773; Court of Appeals No. 296993.

PEOPLE v CONEY, No. 141785; Court of Appeals No. 298043.

PEOPLE v NAPIER, No. 141788; Court of Appeals No. 298487.

PEOPLE v WEDELL, No. 141789; Court of Appeals No. 298806.

PEOPLE v RAFAEL BEAN, No. 141790; Court of Appeals No. 299160.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v AARON, No. 141804; Court of Appeals No. 297201.

PEOPLE v FRIEDMAN, No. 141805; Court of Appeals No. 297140.

PEOPLE v CLAY, No. 141808; Court of Appeals No. 297821.

PEOPLE v BALFOUR, No. 141820; Court of Appeals No. 297724.

PEOPLE v MARTINEZ, No. 141821; Court of Appeals No. 299539.

HINSBERG v HINSBERG, No. 141827; Court of Appeals No. 290481.

PEOPLE v GREGORY GIBSON, No. 141831; Court of Appeals No. 296963.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v FARROW, No. 141843; Court of Appeals No. 298804.

PEOPLE v DANTE ROGERS, No. 141856; Court of Appeals No. 288571.

PEOPLE v PURIFY, No. 141872; Court of Appeals No. 298925.

HILL v JOHNSON, Nos. 141874, 141883, and 141884; Court of Appeals Nos. 297354, 297359, and 297372.

BURT v DEPARTMENT OF TREASURY, No. 141885; Court of Appeals No. 290868.

PEOPLE v DALE JOHNSON, No. 141881; Court of Appeals No. 299589.

BLUE RIVER FINANCIAL GROUP, INC v TBI ENTERPRISES, LLC and COMPUTER BUSINESS WORLD, LLC v THOMAS, Nos. 141910 and 141911; Court of Appeals Nos. 289396 and 290366.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v AL-AWADI, No. 141916; Court of Appeals No. 291853.

PEOPLE v ANTONIO WILLIAMS, No. 141917; Court of Appeals No. 291208.

PEOPLE v BELIN, No. 141918; Court of Appeals No. 299390.

PEOPLE v LaROSE, No. 141924; Court of Appeals No. 278351.

PEOPLE v LAROE, No. 141936; Court of Appeals No. 299569.

PEOPLE v DAVID JOHNSON, No. 141937; Court of Appeals No. 299101.

PEOPLE v WILLIAM BROWN, No. 141940; Court of Appeals No. 299201.

ERICK BROWN v DEPARTMENT OF CORRECTIONS, No. 141942; Court of Appeals No. 297413.

PEOPLE v MARK MOORE, No. 141948; Court of Appeals No. 290256.

FINDLING v PARKER, No. 141950; Court of Appeals No. 291567.

PEOPLE v RONNIE WILLIAMS, No. 141953; Court of Appeals No. 290933.

LEVINE v MONROE COUNTY EMERGENCY MEDICAL AUTHORITY, No. 141958; Court of Appeals No. 288844.

PEOPLE v STAV, No. 141961; Court of Appeals No. 299448.

PEOPLE v BRANION, No. 141962; Court of Appeals No. 292647.

HOFFMAN v BOONSIRI, Nos. 141969 and 141971; reported below: 290 Mich App 34.

PEOPLE v KNEPPER, No. 141973; Court of Appeals No. 299315.

PEOPLE v COLLINS, No. 141975; Court of Appeals No. 293184.

PEOPLE v SHELTON CARTER, No. 141976; Court of Appeals No. 291527.

PEOPLE v PETTWAY, No. 141980; Court of Appeals No. 292170.

PUTRUSS v MARY A AND EDWARD P O'HALLORAN TRUST, No. 141982; Court of Appeals No. 291160.

PEOPLE v CISTRUNK, No. 141988; Court of Appeals No. 291862.

PEOPLE v DESHAWN CARTER, No. 141992; Court of Appeals No. 291535.

POLY BOND INC v JEN-TECH CORPORATION, No. 141993; Court of Appeals No. 290429.

PEOPLE v JAQUAN LOVE, No. 141994; Court of Appeals No. 291774.

MCCOY v FARM BUREAU LIFE INSURANCE COMPANY OF MICHIGAN, No. 141997; Court of Appeals No. 291049.

PEOPLE v TURMAN, No. 142000; Court of Appeals No. 299681.

PEOPLE v NELUMS, No. 142003; Court of Appeals No. 290352.

DUTTON PARTNERS v CMS ENERGY CORPORATION, No. 142007; reported below: 290 Mich App 635.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

In re DONALD K EGELUS LIVING TRUST, No. 142011; Court of Appeals No. 292020.

LAVIGNE v GLORE, No. 142013; Court of Appeals No. 290858.

PEOPLE v MAZAK, No. 142014; Court of Appeals No. 293453.

PEOPLE v DARICK ANDERSON, No. 142016; Court of Appeals No. 292072.

PEOPLE v BRIGHAM, No. 142018; Court of Appeals No. 299710.

PEOPLE v WALKER, No. 142021; Court of Appeals No. 292043.

PEOPLE v BRANDON BELL, No. 142022; Court of Appeals No. 290691.

In re RINKE ESTATE, No. 142025; Court of Appeals No. 293394.

RAMSEY v SECURITAS SECURITY SERVICES, No. 142026; Court of Appeals No. 296734.

PEOPLE v SHOUP, No. 142028; Court of Appeals No. 299193.

PEOPLE v FINLEY, No. 142029; Court of Appeals No. 293151.

BETHANY LUTHERAN CHURCH v PORTER, Nos. 142032 and 142033; Court of Appeals Nos. 291742 and 291762.

PEOPLE v CALHOUN, No. 142035; Court of Appeals No. 299688.

PEOPLE v AGELINK, No. 142037; Court of Appeals No. 292198.

PEOPLE v CHILDS, No. 142038; Court of Appeals No. 291878.

PEOPLE v TIGGLE, No. 142043; Court of Appeals No. 292567.

DUFFINEY v HOME OWNERS INSURANCE COMPANY, No. 142048; Court of Appeals No. 292583.

WARREN v COCA-COLA ENTERPRISES INC, No. 142049; Court of Appeals No. 298281.

PEOPLE v MICHAEL DAVIS, No. 142054; Court of Appeals No. 299572.

PEOPLE v GAMBLE, No. 142056; Court of Appeals No. 291289.

PEOPLE v RODRECKIS BROOKS, No. 142057; Court of Appeals No. 300312.

AUTO CLUB INSURANCE ASSOCIATION v SCOTT, No. 142061; Court of Appeals No. 291911.

PEOPLE v KAMP, No. 142064; Court of Appeals No. 299817.

PEOPLE v HICKS, No. 142067; Court of Appeals No. 292314.

PEOPLE v FOX, No. 142068; Court of Appeals No. 293131.

PEOPLE v LAMONT TAYLOR, No. 142070; Court of Appeals No. 298101.

PEOPLE v TERRY MCDONALD, No. 142071; Court of Appeals No. 299993.

PEOPLE v BALLARD, No. 142072; Court of Appeals No. 292908.

PEOPLE v ANTHONY SMITH, No. 142073; Court of Appeals No. 292543.

PEOPLE v ZEIGLER, No. 142074; Court of Appeals No. 292528.

PEOPLE v ARNOLD, No. 142075; Court of Appeals No. 291361.

SAL-MAR INDUSTRIAL CORPORATION v MACOMB TOWNSHIP, Nos. 142081, 142082, 142083, and 142084; Court of Appeals Nos. 291843, 291844, 294151, and 294339.

PEOPLE v EDWARD HILL, No. 142086; Court of Appeals No. 292810.

PEOPLE v DMITRI ANDERSON, No. 142090; Court of Appeals No. 291962.

PEOPLE v FORBES, No. 142092; Court of Appeals No. 293733.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v KENNETH HENDERSON, No. 142094; Court of Appeals No. 299690.

PEOPLE v MICHAEL JONES, No. 142095; Court of Appeals No. 291882.

PEOPLE v PENNYMAN, No. 142096; Court of Appeals No. 299884.

WILLIAMS v Z F LEMFORDER CORPORATION, No. 142107; Court of Appeals No. 298611.

CAVANAGH, J., would remand this case to the Court of Appeals.

PEOPLE v CHARLENE PEOPLES, No. 142108; Court of Appeals No. 288667.

PEOPLE v SCOTT MCDONALD, No. 142111; Court of Appeals No. 297826.

PEOPLE v SUMPTER, No. 142112; Court of Appeals No. 291886.

PEOPLE v DAYSON, No. 142114; Court of Appeals No. 291702.

PEOPLE v WEILL, No. 142120; Court of Appeals No. 299718.

PEOPLE v SPONSELLER, No. 142121; Court of Appeals No. 299527.

PEOPLE v CHANEY, No. 142122; Court of Appeals No. 300053.

PEOPLE v GRAVES, No. 142124; Court of Appeals No. 293268.

PEOPLE v ROBIN NIXON, No. 142128; Court of Appeals No. 299715.

PEOPLE v PAGE, No. 142129; Court of Appeals No. 291790.

PEOPLE v HODGE, No. 142137; Court of Appeals No. 292722.

PEOPLE v HIERHOLZER, No. 142169; Court of Appeals No. 299707.

PEOPLE v CREEK, No. 142170; Court of Appeals No. 299381.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ANTON BERRY, No. 142172; Court of Appeals No. 293583.

PEOPLE v PECK, No. 142174; Court of Appeals No. 293543.

PEOPLE v NEELY, No. 142179; Court of Appeals No. 300269.

PEOPLE v DAVID TAYLOR, No. 142185; Court of Appeals No. 291949.

PEOPLE v PENNINGTON, No. 142191; Court of Appeals No. 292835.

PEOPLE v LARKINS, No. 142200; Court of Appeals No. 292799.

PEOPLE v LEQUIN ANDERSON, No. 142204; Court of Appeals No. 292958.

BOONE v PAPANEK, No. 142240; Court of Appeals No. 298579.

BARROW v DETROIT MAYOR, No. 142297; reported below: 290 Mich App 530.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PRAGASAM v CIENA HEALTH CARE MANAGEMENT, No. 142425; Court of Appeals No. 297888.

SCOTT v SECRETARY OF STATE, No. 142463; Court of Appeals No. 301249.

Reconsideration Denied March 8, 2011:

PAQUETTE v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 139582; Court of Appeals No. 279909. Leave to appeal denied at 488 Mich 910.

PEOPLE v RODNEY CARTER, No. 140522; Court of Appeals No. 293861. Summary disposition at 488 Mich 925.

BLOOMFIELD FINANCIAL GROUP v HASKINS, No. 140643; Court of Appeals No. 294666. Leave to appeal denied at 488 Mich 900.

AUTO-OWNERS INSURANCE COMPANY v FERWERDA ENTERPRISES, INC, Nos. 140735 and 140738; reported below: 287 Mich App 248. Summary disposition at 488 Mich 917.

In re PRISCILLA M WARD REVOCABLE TRUST, No. 140809; Court of Appeals No. 294557. Leave to appeal denied at 488 Mich 910.

MEADOWS v MEADOWS, No. 141191; Court of Appeals No. 288893. Leave to appeal denied at 488 Mich 911.

KIRCOS v WASLAWSKI, No. 141274; Court of Appeals No. 288894. Leave to appeal denied at 488 Mich 947.

EDWARDS v CAPE TO CAIRO, No. 141339; Court of Appeals No. 280023. Leave to appeal denied at 488 Mich 921.

LASALLE BANK MIDWEST v ZLATKIN, No. 141367; Court of Appeals No. 296308. Leave to appeal denied at 488 Mich 913.

RICHMOND TOWNSHIP v RONDINGO, INC, Nos. 141462 and 141463; Court of Appeals Nos. 288625 and 290054. Leave to appeal denied at 488 Mich 981.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

NATIONAL GENERAL INSURANCE COMPANY v HOME-OWNERS INSURANCE COMPANY, Nos. 141473 and 141474; Court of Appeals Nos. 291131 and 291132. Leave to appeal denied at 488 Mich 948.

JOHN GUIDOBONO II REVOCABLE TRUST AGREEMENT v JONES, No. 141522; Court of Appeals No. 290589. Summary disposition at 488 Mich 989.

PEOPLE v MABINS, Nos. 141615, 141616, 141617, and 141618; Court of Appeals Nos. 290792, 290793, 290794, and 290795. Leave to appeal denied at 488 Mich 949.

BURNETT v ULRICH, No. 141673; Court of Appeals No. 296907. Leave to appeal denied at 488 Mich 954.

PEOPLE v RODNEY HARRIS, No. 141781; Court of Appeals No. 287724. Leave to appeal denied at 488 Mich 996.

Superintending Control Denied March 8, 2011:

TYSON v ATTORNEY GRIEVANCE COMMISSION, No. 142010.

Order Assuming Jurisdiction of Original Action March 9, 2011:

ATTORNEY GENERAL v 54-A DISTRICT JUDGE, No. 142550; Court of Appeals No. 301979. The application for leave to appeal before decision by the Court of Appeals is considered, and it is granted, and this Court hereby assumes jurisdiction of the complaint for quo warranto. The parties having briefed the issues involved, we direct the clerk to place this case on the May 2011 session calendar for argument and submission.

Leave to Appeal Granted March 9, 2011:

ENGENIUS, INC v FORD MOTOR COMPANY, No. 141977; Court of Appeals No. 290682. The parties are directed to address whether the arbitration panel in this case, having determined that the arbitration clause was not included in the parties' FACTS contract, was nevertheless empowered to retain jurisdiction over the arbitration of that contract and to render an award for its breach.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered March 9, 2011:

LAMEAU v CITY OF ROYAL OAK, Nos. 141559 and 141560; reported below: 289 Mich App 153. The parties shall submit supplemental briefs within 42 days of the date of this order addressing (1) whether the presence of the anchored guy wire at issue in this case was a breach of the city of Royal Oak's duty to keep the sidewalk in "reasonable repair" under MCL 691.1402, (2) if so, whether the exclusion to the highway exception for "utility poles" found at MCL 691.1401(e) removes the wire from the highway exception, (3) the significance of the fact that the sidewalk was not opened for public travel by the public defendants and was meant to be barricaded against public use and the fact that the public defendants in this case were aware that the barricades were regularly being set aside or removed by unknown members of the public, (4) whether the alleged conduct of the individual public defendants can reasonably be considered

to constitute gross negligence, and (5) whether the alleged conduct of the individual public defendants can be considered "the" proximate cause of the decedent's injury, particularly in light of the decedent's own conduct in this case and his intoxication at the time of injury. Cf. MCL 600.2955a. The parties should not submit mere restatements of their application papers.

The Michigan Association for Justice, Michigan Defense Trial Counsel, Inc., and the Michigan Municipal League are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

JILEK v STOCKSON, No. 141727; reported below: 289 Mich App 291. At oral argument, the parties shall address (1) whether the Court of Appeals erred in reversing the jury verdict in favor of the defendants on the basis of its conclusion that the trial court erred in determining the applicable standard of care and (2) whether the Court of Appeals erred in holding that evidence of the defendants' internal policies and procedures should have been admitted at trial. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The motions for leave to file brief amicus curiae are granted. The Michigan Association for Justice, the Michigan Health and Hospital Association, and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

SOLOMON v BLUE WATER VILLAGE EAST, No. 141724; Court of Appeals No. 291780. At oral argument, the parties shall address whether there is a genuine issue of material fact as to whether the alleged accumulation of ice on the concrete pad at the base of the stairs at the leased premises in this case rendered it unfit for the use intended by the parties. See MCL 554.139(1)(a) and *Allison v AEW Capital Mgt, LLP*, 481 Mich 419 (2008). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Summary Disposition March 9, 2011:

PEOPLE v TOMASIK, No. 140636; Court of Appeals No. 279161. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to the Kent Circuit Court for further proceedings pursuant to this Court's decision in *People v Stanaway*, 446 Mich 643 (1994). On remand, the trial court shall disclose to the defendant the March 26, 2003, report authored by Timothy Zwart of Pine Rest Christian Mental Health Services and the March 1, 2003, form authored by Denise Joseph-Enders. After disclosing

these documents to the defendant, the trial court shall permit the defendant to argue that a new trial should be granted. We do not retain jurisdiction.

PEOPLE v ABBAS, No. 141797; Court of Appeals No. 298862. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The Court of Appeals shall address whether (1) if, as the defendant contends, his trial counsel failed to advise him that he was not eligible for Holmes Youthful Trainee Act status (MCL 762.11 *et seq*.), the Kalamazoo Circuit Court nevertheless correctly held that the defendant cannot meet the standard for establishing entitlement to relief from judgment absent the retroactive application of *Padilla v Kentucky*, 559 US ___ ; 130 S Ct 1473; 176 L Ed 2d 2928 (2010), and (2) the decision in *Padilla* may be applied retroactively in this case.

PEOPLE v DAVENPORT, No. 141832; Court of Appeals No. 287767. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the Court of Appeals' order denying the defendant's motion to remand for an evidentiary hearing. The defendant should have been permitted to develop the record on the issue of whether his shackling during trial prejudiced his defense. See *Rhoden v Rowland*, 10 F3d 1457, 1460 (CA 9, 1993). We also reverse the Court of Appeals' determination that the defendant did not preserve the issue of whether his shackling during trial constituted a due process violation, because defense counsel requested that both of defendant's hands be unshackled to avoid the prejudice that would result if the jury saw the shackles and the circuit court denied her request. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549 (1999); trial transcript vol I, p 113. If it is determined that the jury saw the defendant's shackles, the circuit court shall determine whether the prosecution can demonstrate beyond a reasonable doubt that the shackling error did not contribute to the verdict against the defendant. *Deck v Missouri*, 544 US 622, 635; 125 S Ct 2007; 161 L Ed 2d 953 (2005). We remand this case to the circuit court for further proceedings consistent with this order. In all other respects, leave to appeal is denied because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v MCKINNEY, No. 142268; Court of Appeals No. 296455. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The defendant's statement that he would "just as soon wait" until he had an attorney before talking to the police, followed immediately by his statement that he was willing to discuss the "circumstances," was not an unequivocal assertion of the right to counsel or a statement declaring an intention to remain silent. *Davis v United States*, 512 US 452, 457; 114 S Ct 2350; 129 L Ed 2d 362 (1994). We remand this case to the Hillsdale Circuit Court for further proceedings not inconsistent with this order.

MARILYN KELLY, J., would deny leave to appeal.

Leave to Appeal Denied March 9, 2011:

PEOPLE v WACLAWSKI, No. 140629; reported below: 286 Mich App 634.

PEOPLE v SEIBA, No. 141622; Court of Appeals No. 286104.
MARILYN KELLY, J., would grant leave to appeal.

BUTLER v WAYNE COUNTY, No. 141667; reported below: 289 Mich App 664.

CAVANAGH and MARILYN KELLY, JJ., would grant leave to appeal.

HATHAWAY, J., stated as follows: I am not participating in this matter because I have a vested financial interest in defendant Wayne County's pension system, which is the subject matter of this litigation. See MCR 2.003(C)(1)(f).

PEOPLE v DRUZYNSKI, No. 141742; Court of Appeals No. 289521.

MARILYN KELLY, J., would grant leave to appeal.

KINGMARTIN v GENERAL MOTORS CORPORATION, No. 141806; Court of Appeals No. 289699.

PEOPLE v MALIK, No. 141859; Court of Appeals No. 293397.

CAVANAGH, J., would grant leave to appeal.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 11, 2011:

PEOPLE v DONALD RICHARDSON, No. 141752; Court of Appeals No. 291617. The parties shall file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. The parties shall include among the issues to be briefed whether, under the circumstances of this case, it was proper to instruct the jury in accordance with CJI2d 7.16, which permits consideration of whether the defendant had a duty to retreat. See MCL 768.21c; *People v Riddle*, 467 Mich 116, 134, 141 n 30 (2002). We order the Wayne Circuit Court to appoint the State Appellate Defender Office to represent the defendant in this Court.

Leave to Appeal Denied March 11, 2011:

PLUNKETT v DEPARTMENT OF TRANSPORTATION, No. 140193; reported below: 286 Mich App 168.

MARKMAN, J. (*concurring*). I concur in the denial of leave to appeal because I believe that the Court of Appeals reached the correct result. Plaintiff alleges that defendant failed to correct rutting on the highway and that rain water accumulated in the ruts, which caused plaintiff's decedent to hydroplane and to lose control of her vehicle. The highway exception to governmental immunity, MCL 691.1402(1), provides, in pertinent part, "each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." In *Haliw v Sterling Hts*, 464 Mich 297, 312 (2001), relying on the 'natural accumulation' doctrine, this Court held that the city was not liable for injuries that

plaintiff suffered when she slipped and fell on ice that had formed in a depression on a sidewalk. *Haliw* explained that " '[i]t has long been the law in this state . . . that a governmental agency's failure to remove the natural accumulations of ice and snow on a public highway does not signal negligence of that public authority.' " *Id.* at 305, quoting *Stord v Dep't Transp*, 186 Mich App 693, 694 (1991). *Haliw* relied heavily upon *Hopson v Detroit*, 235 Mich 248 (1926), which similarly held that a municipality was not liable for injuries that plaintiff suffered when she slipped and fell on ice that had formed in a depression on a sidewalk. *Hopson*, explained:

> "We think the proper and only reasonable interpretation of the statute is, that wherever ice or snow is the sole proximate cause of the accident, there shall be no liability, but where at the time of the accident there is any other defect to which, as a proximate cause, the accident is in part attributable, there may be a liability notwithstanding the fact that it also may be attributable in part to ice or snow. *This other defect, however, is not a proximate cause within the meaning of this rule, simply because it causes the accumulation of the ice or snow.*" [*Hopson*, 235 Mich at 252, quoting *Newton v City of Worcester*, 174 Mass 181, 187 (1899) (emphasis added).]

Haliw, 464 Mich at 307, specifically quoted this language with approval.

In the instant case, although there is testimony that ruts in the roadbed can be dangerous even where the road is dry, i.e., "at any time," there is no evidence that the ruts caused the accident at issue here other than by causing the rain water to collect in the ruts. And, as this Court held in both *Hopson*, 235 Mich at 252, and *Haliw*, 464 Mich at 307, the defect "is not a proximate cause . . . simply because it causes the accumulation of the ice or snow." Because the roadbed ruts only caused the accumulation of the water, they were not a proximate cause of the accident.

The dissent argues that this case is distinguishable from *Haliw* because *Haliw* involved a *natural* accumulation of ice on a *sidewalk*, while the instant case involves an *unnatural* accumulation of water on a *highway*. First, given that MCL 691.1401(e) defines "highway" as including "sidewalks," the fact that *Haliw* involved a sidewalk and the instant case involves a highway is irrelevant—they are both "highways" for purposes of the governmental tort liability act. Second, given that *Haliw* held that the accumulation of ice in a depression constitutes a "natural accumulation," the accumulation of water in the ruts at issue here must also be considered a "natural accumulation" for purposes of the natural accumulation doctrine.

Accordingly, for the same reason that the defendant in *Haliw* was not liable for the accumulation of ice in the depression on the sidewalk, defendant here is not liable for the accumulation of water in the ruts on the highway—neither the depression nor the ruts caused anything other than the accumulation of ice or water. That is, just as the ice that formed in the depression in *Haliw* is what caused the plaintiff to fall, not the

depression itself, here, the water that formed in the ruts is what caused plaintiff's decedent to hydroplane and lose control of her vehicle, not the ruts themselves, and, thus, defendant cannot be held liable.

YOUNG, C.J., joined the statement of MARKMAN, J.

MARILYN KELLY, J. (*dissenting*). I dissent from the Court's order denying plaintiff's application for leave to appeal. By voting to deny leave to appeal, three justices of this Court allow to stand a clearly erroneous published decision of the Court of Appeals. For the reasons set forth below, I would reverse the Court of Appeals and reinstate the trial court's order denying defendant's motion for summary disposition.

FACTUAL BACKGROUND

In 2005, Holly Plunkett was traveling southbound on US-127 in Clare County. She lost control of her vehicle and struck a tree, sustaining fatal injuries in the accident. According to the police report, "it was raining hard at the time, [and] there was some standing water in the roadway where the vehicle tires traveled." The report further suggested that Mrs. Plunkett lost control of her vehicle as a result of hydroplaning.

Plaintiff Jerome Plunkett, the personal representative of Mrs. Plunkett's estate, filed suit against the Michigan Department of Transportation (MDOT). Plaintiff's third amended complaint alleged that Mrs. Plunkett's accident was the result of "sudden[] and unexpected[] los[s of] control of her vehicle due to the dangerous and defective conditions which existed on/at the actual physical structure of the roadbed surface of the highway at issue . . . ." Plaintiff's complaint further alleged that

> [a]s the direct and proximate result of Defendant's failure to maintain the highway at issue in reasonable repair and in a condition reasonably safe and fit for public/vehicular travel, defects in the actual physical [sic] of the roadbed surface of said highway, designed for vehicular travel, allowed an unnatural accumulation of rainfall to pool/collect.[1]

As a result of this alleged failure to maintain the highway in reasonable repair and in a condition reasonably safe for vehicular travel, plaintiff averred that Mrs. Plunkett's van hydroplaned on the road. She then lost control of it.

Plaintiff further alleged, and it is undisputed, that the stretch of US-127 in question was reconstructed in 1990, at which time it was reasonably safe and fit for vehicular travel. However, plaintiff claimed that

> [o]ver a period of time, the portion of the highway at issue fell into disrepair which caused the actual physical structure of the road-

---

[1] Plaintiff's third amended complaint, ¶ 20.

bed's surface to thereafter contain substantially dangerous and defective conditions in violation of MCL 691.1402.[2]

The parties do not dispute that, as originally designed and reconstructed in 1990, US-127 included both (1) super-elevation and (2) cross-slope/crown features. Respectively, these design features provide (1) a gentle banking of the road to compensate for centrifugal force acting on vehicles negotiating a curve in the road and (2) a gentle sloping of the pavement downward from the center to cause water to run off to either side of the road and prevent water accumulation.

Plaintiff's complaint alleged that MDOT engaged in a repair technique known as "microsurfacing." This was an effort to correct the effects of wear which altered the super-elevation and cross-slope/crown characteristics of the road from its 1990 construction. As a result of the microsurfacing, it asserted, water no longer ran off the surface of the road. Additionally, the physical structure of the road allegedly became hazardous and defective because it was not properly maintained and in reasonable repair. It was no longer in a condition reasonably safe and fit for vehicular travel. Plaintiff asserted that there was (1) excessive wheel track rutting, (2) excessive wear, (3) an uneven gradient that resulted from excessive wear, and (4) an inadequate cross-slope/crown and inadequate super-elevation.[3] Plaintiff further alleged that the defective condition had existed for at least 30 days before the accident and that MDOT knew or should have known about it for at least 30 days.

It is undisputed that MDOT had scheduled the portion of US-127 in question to be resurfaced to correct defects that resulted from excessive wear. Plaintiff established through the testimony of MDOT employee Terence Palmer and former MDOT engineer Larry Galehouse that an accumulation of water on the highway would pose a safety concern.

Plaintiff theorized that during the 15 years since the 1990 reconstruction of US-127 and Mrs. Plunkett's accident, MDOT's maintenance and repair activities effectively eliminated the road's original super-elevation and cross-slope/crown. Furthermore, due to traffic wear, the road had become rutted. As a result, water became trapped in the ruts because it could no longer run off, owing to the lack of super-elevation and cross-slope/crown. Hence, plaintiff alleged that MDOT created a defect independent of the rainfall that caused water to pool on the road. This, in turn, caused Mrs. Plunkett's vehicle to hydroplane and crash.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) on the basis of governmental immunity.[4] The trial court denied defendant's motion. It reasoned that MDOT had not satisfied its

---

[2] *Id*. at ¶ 24.

[3] *Id*. at ¶¶ 27-30.

[4] Defendant actually filed motions for summary disposition on three separate occasions. Defendant abandoned its first motion after plaintiff amended his complaint. The trial court heard argument on the second motion, but continued the hearing until plaintiff's liability experts could be deposed. Defendant thereafter filed its third motion.

statutory duty to keep the highway "in reasonable repair and in a condition reasonably safe and fit for travel" by "simply having a road and letting it degrade in such a way that it only represents a direct serious traffic hazard on rainy days." The trial court further ruled that no statute or case says "you only have to maintain and repair your roads sufficiently so that they work pretty well on sunny days or dry days, but they are unbelievably dangerous on wet days."

The Court of Appeals reversed the trial court's decision, concluding that it erred in denying summary disposition on the basis of governmental immunity.[5] The Court reasoned that the only claim a plaintiff may sustain is one arising out of a defect in the actual roadbed itself. It found that liability under the "highway" exception to governmental immunity does not extend to claims based on design defects or natural accumulations of ice and snow. The Court opined that plaintiff's claims based on the defective super-elevation and cross-slope/crown were not claims for lack of repair or maintenance, but were instead premised on design defects. Accordingly, the Court held that MDOT was entitled to summary disposition.

We granted oral argument on plaintiff's application for leave to appeal.[6]

LEGAL BACKGROUND

We review de novo a trial court's ruling on a motion for summary disposition.[7] When considering whether a motion for summary disposition brought pursuant to MCR 2.116(C)(7) was properly decided, we consider all documentary evidence. We accept the contents of a complaint as factually accurate unless contradicted by documentation submitted by the moving party.[8] This case involves a question of statutory interpretation, which we also review de novo.[9]

The governmental tort liability act, MCL 691.1401 *et seq*., provides immunity for governmental agencies including MDOT. Under MCL 691.1407, governmental agencies are generally immune from tort liability while engaged in the exercise or discharge of a governmental function

---

[5] *Plunkett v Dep't of Transp*, 286 Mich App 168 (2009).

[6] 486 Mich 936 (2010).

[7] *Shay v Aldrich*, 487 Mich 648, 656 (2010).

[8] *Patterson v Kleiman*, 447 Mich 429, 434 n 6 (1994).

[9] *Univ of Michigan Regents v Titan Ins Co*, 487 Mich 289, 297 (2010).

unless an exception applies.[10] Germane to this appeal is the "highway" exception to governmental immunity, MCL 691.1402(1), which provides, in pertinent part:

> [E]ach governmental agency having jurisdiction over a highway *shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel*. A person who sustains bodily injury or damage to his or her property by reason or failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. [Emphasis added.]

Furthermore, MCL 691.1403 provides:

> No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.

In its opinion reversing the trial court and granting defendant's motion for summary disposition, the Court of Appeals relied heavily on *Haliw v Sterling Hts*.[11] In that case, the plaintiff brought an action for damages related to injuries suffered when she slipped and fell on an ice-filled depression in a sidewalk. The trial court denied her motion for summary disposition. The Court of Appeals affirmed, finding that the plaintiff presented evidence creating an issue of fact regarding whether the sidewalk was reasonably safe for public travel under MCL 691.1402(1).[12] The defendant appealed.

This Court held that a plaintiff cannot maintain a claim against a governmental agency where the sole proximate cause is the natural accumulation of ice or snow. Rather, the Court opined that there must exist a combination of ice or snow and a defect that, in tandem, render the sidewalk not reasonably safe for public travel at any time. In so

---

[10] The statutory exceptions to governmental immunity include (1) the "highway" exception, MCL 691.1402, (2) the "motor vehicle" exception, MCL 691.1405, (3) the "public building" exception, MCL 691.1406, (4) the "proprietary function" exception, MCL 691.1413, and (5) the "governmental hospital" exception, MCL 691.1407(4).

[11] *Haliw v Sterling Hts*, 464 Mich 297 (2001).

[12] The "highway" exception to governmental immunity encompasses liability for injuries arising out of the use of sidewalks. See MCL 691.1401(e).

holding, the Court cited *Hopson v Detroit*[13] for the proposition that ice on a sidewalk, whether on level places or in depressions, constitutes no defect entailing liability.[14] Accordingly, the Court stated that a governmental agency's failure to remove ice or snow from a highway, by itself, does not constitute negligence.

ANALYSIS

This case plainly illustrates the inadequacies of the sidewalk defect analysis employed by the Court in *Haliw* when applied, as it was here, to a highway defect. The theory that a defect must be capable of causing an accident in the absence of ice (or in this case water) should not be applied to high-speed roadways.[15]

The Court of Appeals and three justices of this Court, including my concurring colleague, simply ignore plaintiff's clear allegations and evidence that MDOT's repairs to US-127 were unreasonable and created a defective road surface condition. As MDOT's own expert, Professor Gilbert Baladi, acknowledged, rutting inevitably occurs on all asphalt pavement with the passage of time. Plaintiff claims that the road ceased to be self-draining as a direct result of MDOT's repairs because they eliminated the cross-slope/crown and super-elevation needed to drain water from the pavement. The rutting that ensued was not only foreseeable, but was actually known to MDOT, which had scheduled, but not yet performed, repairs to correct the rutting. Consequently, plaintiff asserts, the road became inherently dangerous.

As an initial matter, I question the validity of applying *Haliw* to this case. *Haliw* dealt with the natural accumulation of ice in a sidewalk depression. Here, by contrast, plaintiff contends that water unnaturally accumulated in ruts on the road because of MDOT's defective repairs. Thus, this case is distinguishable from *Haliw*, notwithstanding the fact that they both involve the "highway" exception to governmental immunity.

Even if *Haliw* did apply, importing its analysis to this case is untenable considering plaintiff's assertions. Plaintiff alleged that:

> On or about May 19, 2005, the *actual physical structure of the roadbed's surface*, of the improved portion of the highway at issue, was at that time substantially hazardous and defective, not properly maintained, and/or not in reasonable repair and in a condition reasonably safe and fit for public/vehicular travel, for the following reasons:
>
> a. excessive wheel track rutting,
>
> b. uneven gradient due to excessive wear,

---

[13] *Hopson v Detroit*, 235 Mich 248 (1926).

[14] *Haliw*, 464 Mich at 306-307.

[15] I continue to adhere to my dissenting opinion in *Haliw* and believe that case was wrongly decided. I nonetheless recognize that the majority opinion remains the law of this state until overturned.

> c. excessive wear,
>
> d. inadequate cross-slope/crown,
>
> e. inadequate super-elevation, and
>
> f. any other defects the Plaintiff may discover in the future exclusive of those listed here.[16]

Moreover, plaintiff explicitly alleged a defect in the actual physical surface of the road, which, together with the unnatural accumulation of water, proximately caused Mrs. Plunkett's accident:

> The aforementioned defects in the *actual physical structure of the roadbed's surface* caused rainfall to unnaturally collect and pool/stand on the roadway's surface in excessive and dangerous amounts when it rained.
>
> The aforementioned defects in the actual physical structure of the highway, *with the* unnaturally pooled water and/or rainfall, proximately caused Mrs. Plunkett's accident.[17]

In my view, plaintiff's complaint sufficiently alleged that a defect *in addition to* the accumulation of water in the ruts proximately caused Mrs. Plunkett's death. Indeed, plaintiff satisfied the explicit requirement of *Haliw* that "an independent defect, other than the accumulation of ice or snow [or, in this case, water], must be at least a proximate cause of plaintiff's injury in order . . . to recover under [MCL 691.1402(1)].[18]

To sustain a claim under *Haliw*, "one of the causes [of the alleged injury] at least must be a defect in the sidewalk [here, the roadway] rendering the sidewalk not reasonably safe for public travel *at any time*."[19] As noted above, *Haliw* cited *Hopson* for the proposition that " '[i]ce on a sidewalk, whether on level places or in depressions, constitutes no defect entailing liability.' "[20] Thus, in both *Haliw* and *Hopson*, the complaint was based on the presence of ice. The Court held on each occasion that, when ice is the sole proximate cause of an injury, there can be no liability. Yet *Haliw* explicitly acknowledged that there *may* be liability when there is another defect to which the accident is attributable in part.[21]

The reasoning originally adopted by *Hopson* and extended in *Haliw* is that the sidewalk defects were not a proximate cause of the plaintiffs' injuries because they merely caused ice to accumulate. The question in each case was whether the actual physical condition of the sidewalk was such that " 'there is at the time any other danger to the steps of the traveler than that arising from the presence of ice or snow; if there be no

---

[16] Plaintiff's third amended complaint, ¶ 30 (emphasis added).

[17] *Id*. at ¶¶ 33-34 (emphasis added).

[18] *Haliw*, 464 Mich at 309 n 9.

[19] *Id*. at 307.

[20] *Id*., quoting *Hopson*, 235 Mich at 250-251 (emphasis omitted).

[21] *Haliw*, 464 Mich at 307, quoting *Hopson*, 235 Mich at 252.

other danger, then for the time being the way is "otherwise reasonably safe and convenient."' "[22] Thus, *Haliw* and *Hopson* relied on what is commonly known as the "natural accumulation" doctrine, which dictates that the failure to remove ice or snow from a road does not constitute negligence.[23]

Yet the *Haliw* majority recognized that there are cases in which there is a defect distinct from the natural accumulation of ice or snow that can provide the basis for a viable negligence claim. In such cases, *Haliw* remarked that "an independent defect, other than the accumulation of ice or snow, must be at least *a* proximate cause plaintiff's injury in order . . . to recover under [MCL 691.1402(1)]."[24] The Court further noted that under the facts of that case, "the natural accumulation of ice in the depression effectively vitiated the unsafe condition presented by the depression itself."[25] Accordingly, the Court concluded that the depression did not proximately cause the plaintiff's injury because it did not render the sidewalk out of repair within the meaning of MCL 691.1402(1).[26] In a subsequent footnote, the Court stated that the rule "is that a plaintiff cannot recover if an injury is due *solely* to the presence of ice on a sidewalk, even if a depression in the sidewalk caused the accumulation."[27]

It is manifestly unreasonable to conclude in this case, as the Court did in *Haliw*, that the presence of water "effectively vitiated the unsafe condition presented by the depression" in the road.[28] Rather, the difficulty plaintiff had in controlling her vehicle because of the presence of persistent ruts was *compounded* by the presence of the water that the ruts caused to unnaturally accumulate. This situation seems to contemplate the very example set forth by Justice MARKMAN, who authored the opinion of the Court in *Haliw*:

> Even if we were to assume that the claimed depression here represented a condition that rendered the sidewalk "not reasonably safe for public travel" at all times, under the facts of the present case the natural accumulation of ice in the depression effectively vitiated the unsafe condition.
>
> This point, perhaps, is better illustrated by way of example. Under the first scenario, a six-foot deep hole exists in the middle of

---

[22] *Haliw*, 464 Mich at 307 (citations omitted).

[23] See, e.g., *Stord v Dep't of Transp*, 186 Mich App 693, 694 (1991) ("It has long been the law in this state . . . that a governmental agency's failure to remove the *natural accumulations* of ice and snow on a public highway does not signal negligence of that public authority.") (emphasis added).

[24] *Haliw*, 464 Mich at 309 n 9 (emphasis added).

[25] *Id*. at 310 n 10.

[26] *Id*. at 311.

[27] *Id*. at 311 n 11 (emphasis added).

[28] *Id*. at 311 n 10.

> a sidewalk. Water naturally accumulates in the top of the hole and, because of the weather conditions, freezes so that, in effect, the hole no longer exists. While walking upon the sidewalk, an individual steps on the ice, slips, and falls, thereby incurring injury. Under this scenario, it can only be said that the sole proximate cause of the slip and fall was the presence of the natural accumulation of ice. A different outcome, however, would present under a scenario where the same six-foot hole in the sidewalk is present, but the ice forms several inches below the top of the hole. While walking upon the sidewalk, an individual steps on the edge of the hole, which causes him to momentarily lose his balance. While attempting to remain upright, this individual slips on the ice that had naturally accumulated in the hole. Under this scenario, *it must be said that, in tandem, the defect and the natural accumulation of ice combined to proximately cause the slip and fall*.[29]

When repairs are defectively performed, such that they eliminate design features and prevent a road from naturally draining, an ensuing accumulation of water in admittedly foreseeable ruts can hardly be deemed "natural." Therefore, the ruts caused by the allegedly defective repairs caused an unnatural impoundment of water that constitutes a foreseeable, hazardous condition that plaintiff claims was a proximate cause of Mrs. Plunkett's accident. These nuanced allegations, lost on a majority of this Court, are sufficient to maintain a claim under MCL 691.1402(1), which requires MDOT to "maintain the highway *in reasonable repair* so that it is reasonably safe and convenient for public travel."

It defies logic to conclude that a repair that actually eliminates design features necessary to prevent the accumulation of water is reasonable. Equally ungrounded in common sense is this conclusion of the Court of Appeals: a failure to correct a known rutting condition that, in combination with an unreasonable repair, caused the highway to be unsafe for travel, did not constitute a violation of MDOT's statutory duty to perform a reasonable repair. At the very least, there exists a genuine issue of fact on that question such that summary disposition is inappropriate.

Finally, perhaps the Court of Appeals' most egregious error was its baseless conclusion that plaintiff's claim must fail because it is premised on a design defect.[30] One need not look further than ¶ 23 of plaintiff's third amended complaint to realize this conclusion is incorrect. There, plaintiff explicitly states, "Initially, the improved portion of the highway, designed for vehicular travel, was *correctly designed and built*, and in a condition reasonably safe and fit for vehicular/public travel at all times."[31] (Emphasis added.) This allegation, standing alone, belies the Court of Appeals' conclusion that plaintiff's complaint was premised

---

[29] *Id.* (emphasis added).

[30] See *Plunkett*, 286 Mich App at 186-187.

[31] See also plaintiff's third amended complaint, ¶ 26 ("[T]he improved portion of the highway, designed for vehicular travel, *was correctly designed and built* . . . .") (emphasis added).

upon a design defect. Yet the Court of Appeals also failed to comprehend the substance of plaintiff's subsequent allegations in ¶¶ 27-29. There, plaintiff averred that MDOT's "micro[]surfacing [repair] projects negligently altered the cross-slope/crown and/or super-elevation." Thus, in reality, plaintiff alleged that the *correctly designed and constructed* road was later unreasonably repaired by MDOT's actions, which proximately caused Mrs. Plunkett's death.

CONCLUSION

The Court of Appeals erred in numerous respects by reversing the trial court's denial of defendant's motion for summary disposition. The Court of Appeals (1) erroneously concluded that plaintiff's claims were based on design defects, (2) erroneously concluded that the rutting in US-127 was a not a persistent defect of which MDOT should have had notice, and (3) erroneously concluded that there exists no genuine issue of fact as to whether Mrs. Plunkett's accident was proximately caused in part by MDOT's defective repairs, in conjunction with the unnatural accumulation of water in ruts. By denying plaintiff's application for leave to appeal, a minority of this Court, whose votes are sufficient to carry the day in this case (owing to the recusal of Justices CAVANAGH and ZAHRA), has chosen to ignore these errors rather than correct them. I dissent from its decision to do so and would instead reverse the Court of Appeals and remand this case to the trial court for further proceedings.

HATHAWAY, J., would grant leave to appeal.

CAVANAGH, J., did not participate due to a familial relationship with counsel of record.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

ZADRZYNSKI v GOLF SERVICES, LLC, No. 142409; Court of Appeals No. 287151.

PEOPLE v TIMARAC, No. 142446; Court of Appeals No. 301083.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court (other than grants and denials of leave to appeal from the Court of Appeals) of general interest to the bench and bar of the state.

Order Entered September 21, 2010:

PROPOSED AMENDMENT OF MCR 2.002.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.002 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Proposed additions are indicated by underline and deletions by strikeover, unless otherwise indicated below:]

RULE 2.002. WAIVER OR SUSPENSION OF FEES AND COSTS FOR INDIGENT PERSONS.

(A)-(C) [Unchanged.]

(D) Other Indigent Persons. If a party shows by ex parte affidavit or otherwise that he or she is unable because of indigency to pay fees and costs, the court shall order those fees and costs either waived or suspended until the conclusion of the litigation. If a court determines that an action is frivolous or malicious, that court may deny leave to proceed *in forma pauperis*.

(E)-(G) [Unchanged.]

Staff Comment: This proposed amendment would update MCR 2.002 to clarify that if a party files a frivolous or malicious action, a court may deny the indigent party's ability to proceed *in forma pauperis*. The rule is similar to the Rules of the Supreme Court of the United States, Rule 39.8.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-12. Your comments

and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Orders Entered October 26, 2010:

PROPOSED AMENDMENT OF MCR 8.121.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.121 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Proposed additions are indicated by underline and deletions by strikeover, unless otherwise indicated below:]

RULE 8.121. CONTINGENT FEES IN CLAIMS OR ACTIONS FOR PERSONAL INJURY, ~~AND~~ WRONGFUL DEATH, AND NO-FAULT BENEFITS.

(A) Allowable Contingent Fee Agreements. In any claim or action for personal injury or wrongful death based upon the alleged conduct of another or for no-fault benefits, in which an attorney enters into an agreement, expressed or implied, whereby the attorney's compensation is dependent or contingent in whole or in part upon successful prosecution or settlement or upon the amount of recovery, the receipt, retention, or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than the fee stated in subrule (B) is deemed to be fair and reasonable. The receipt, retention, or sharing of compensation which is in excess of such a fee shall be deemed to be the charging of a "clearly excessive fee" in violation of MRPC 1.5(a).

(B)-(G) [Unchanged.]

Staff Comment: This proposed amendment of MCR 8.121was submitted to the Court to address a situation in which attorneys charge more than the one-third contingency fee that is the allowable fee limit charged in wrongful death and personal injury actions.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2007-17. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF MCR 8.126.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.126 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website at http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Proposed additions are indicated by underline and deletions by strikeover, unless otherwise indicated below:]

RULE 8.126. TEMPORARY ADMISSION TO THE BAR.

(A) Temporary Admission. Any person who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in any foreign country, and who is not disbarred or suspended in any jurisdiction, and who is eligible to practice in at least one jurisdiction, may be permitted to appear and practice in a specific case in a court, ~~or~~ before an administrative tribunal or agency, or in a specific arbitration proceeding in this state when associated with and on motion of an active member of the State Bar of Michigan who appears of record in the case. An out-of-state attorney may appear and practice under this rule in no more than five cases in a 365-day period. Permission to appear and practice is within the discretion of the court or administrative tribunal or agency, and may be revoked at any time for misconduct. For purposes of this rule, an out-of-state attorney is one who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in a foreign country.

(1) Procedure.

(a) Motion. An attorney seeking temporary admission must be associated with a Michigan attorney. The Michigan attorney with whom the out-of-state attorney is associated shall file with the court or administrative tribunal or agency an appearance and a motion that seeks permission for the temporary admission of the out-of-state attorney. The motion shall be supported by an affidavit of the out-of-state attorney seeking temporary admission, which affidavit shall verify

(i) the jurisdictions in which the attorney is or has been licensed or has sought licensure;

(ii) that the attorney is not disbarred, or suspended in any jurisdiction, and is not the subject of any pending disciplinary action, and that the attorney is licensed and is in good standing in all jurisdictions where licensed; and

(iii) that he or she is familiar with the Michigan Rules of Professional Conduct, Michigan Court Rules, and the Michigan Rules of Evidence.

The out-of-state attorney must attach to the affidavit copies of any disciplinary dispositions, and a copy of the acknowledgment letter supplied by the State Bar of Michigan that shows the out-of-state attorney has paid the required fee. The motion shall include an attestation of the Michigan attorney that the attorney has read the out-of-state attorney's affidavit, has made a reasonable inquiry concerning the averments made therein, believes the out-of-state attorney's representations are true, and agrees to ensure that the procedures of this rule are followed. The motion shall also include the addresses of both attorneys.

(b) The Michigan attorney shall send a copy of the motion and supporting affidavit to the Attorney Grievance Commission. Within seven days after receipt of the copy of the motion, the Attorney Grievance Commission must notify the court or administrative tribunal or agency and both attorneys whether the out-of-state attorney has been granted permission to appear temporarily in Michigan within the past 365 days, and, if so, the number of such appearances. ~~The notification shall also indicate whether a fee is due if the court or administrative tribunal or agency grants permission to appear.~~ The court or administrative tribunal or agency shall not enter an order granting permission to appear in a case until the notification is received from the Attorney Grievance Commission.

(c) Order. Following notification by the Attorney Grievance Commission, if the out-of-state attorney has been granted permission to appear temporarily in fewer than 5 cases within the past 365 days, the court or administrative tribunal or agency may enter an order granting permission to the out-of-state attorney to appear temporarily in a case. If an order granting permission is entered, the court shall send a copy of the order to the Michigan attorney, ~~and~~ the out-of-state attorney, and the ~~. The Michigan attorney in turn shall send a copy of the order to the~~ Attorney Grievance Commission.

(d) Fee. ~~If a fee is due, the order shall state that the appearance by the out-of-state attorney is effective on the date the attorney pays a~~ In each case in which an out-of-state attorney seeks temporary admission in Michigan, the attorney must pay a fee equal to the discipline and client-protection portions of a bar member's annual dues. ~~If a fee is not due, the order shall indicate the effective date of the appearance. The attorney is required to pay the fee only once in any period between October 1 and September 30.~~ The discipline portion of the fee shall be paid to the State Bar of Michigan for allocation to the attorney discipline system, and the client-protection portion shall be paid to the State Bar of Michigan for allocation to the Client Protection Fund. Upon payment of the fee, the out-of-state attorney will receive from the State Bar of Michigan an acknowledgment letter that the fee has been paid.

(e) By seeking permission to appear under this rule, an out-of-state attorney consents to the jurisdiction of Michigan's attorney disciplinary system.

Staff Comment: Michigan's updated pro hac vice rule, MCR 8.126, has been in place since 2008, and several changes to the rule have been recommended. Those changes include a requirement that the fee be charged for each request for pro hac vice admission, that the court that grants the

motion send a copy of the order to the AGC (instead of requiring that the Michigan attorney send the copy to the AGC), that the rule specifically include an attorney's temporary admission for arbitration proceedings, and that the fee be required to be paid before an order enters.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-08. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered November 1, 2010:

PROPOSED AMENDMENTS OF SUBCHAPTER 9.100 AND MCR 8.110 AND 8.120 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering amendments of Subchapter 9.100 *et seq*. of the Michigan Court Rules and Rules 8.110 and 8.120 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website, www.courts.michigan.gov/supremecourt.

As a context for review of this proposal, some background information may be helpful. The Attorney Grievance Commission submitted its proposal to the Court in 2006. The Court considered various provisions within the proposal, and before final review for purposes of publication, invited the State Bar of Michigan to convene a workgroup to review the proposal and submit preliminary feedback on it. The SBM did so, and the Court proceeded to final review of the proposal with the benefit of the input from both the AGC and the SBM. Thus, in several places there are alternative versions of language offered that reflect differing suggestions of the AGC and the SBM on a particular issue. In addition, the AGC submitted updated language in early 2010, some of which is reflected in the order.

In addition to the order for publication, the Court is releasing two documents that may be helpful in understanding the proposed changes. One document is a jointly-submitted AGC/SBM memo that describes the main points of difference in the proposals.* Another document is a three-column chart that compares the current rule with the AGC proposal and any alternative language recommended by the SBM.** The Court's order in several places varies from the language offered by either the AGC or SBM, and where it does so, the staff comment describes why the Court chose the language it did.

---

* See 488 Mich 1262-1281—REPORTER.

** See 488 Mich 1282-1402—REPORTER.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language is repealed and replaced by the following language, with additions indicated by underline and deletions by strikeover, unless otherwise indicated below:]

RULE 9.101. DEFINITIONS.

As used in subchapter 9.100:

(1) "board" means the Attorney Discipline Board;

(2) "commission" means the Attorney Grievance Commission;

(3) "administrator" means the grievance administrator;

(4) "investigator" means a person specially designated by the administrator to assist him or her in the investigation of alleged misconduct or requested reinstatement;

(5) "attorney" or "lawyer" means a person regularly licensed, ~~or~~ specially admitted, permitted to practice law in Michigan on a temporary or other limited basis, or who is otherwise subject to the disciplinary authority of Michigan pursuant to order or rule of the Supreme Court;

(6) "respondent" means an attorney named in a request for investigation or complaint, or proceedings for reciprocal discipline, based on a judgment of conviction, or transfers to inactive status under MCR 9.121;

(7) "request for investigation" means the first step in bringing alleged misconduct to the administrator's attention;

(8) "complaint" means the formal charge prepared by the administrator and filed with the board;

(9) "review" means examination by the board of a hearing panel's ~~final~~ order on petition by ~~an aggrieved party~~ the administrator, complainant, or respondent;

(10) "appeal" means judicial re-examination by the Supreme Court of the board's final order on petition by ~~an aggrieved party~~ the administrator, complainant, or respondent;

(11) "grievance" means alleged misconduct;

(12) "investigation" means fact-finding on alleged misconduct under the administrator's direction.

(13) "disbarment" means revocation of the license to practice law.

(14) "complainant" means a person who signs a request for investigation.

(15) "disability inactive status" means inactive status to which a lawyer has been transferred pursuant to MCR 9.121 or a similar rule of another jurisdiction.

(16) "disciplinary proceeding" means all matters filed with the board.

Staff comment: The proposed revisions in this rule would clarify and add to the definitions in the rules as a whole.

RULE 9.103. STANDARDS OF CONDUCT FOR ATTORNEYS.

(A) General Principles. The license to practice law in Michigan is,

among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice law. These standards include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court.

(B) Duty to Assist Public to Request Investigation. An attorney shall assist a member of the public to communicate to the administrator, in appropriate form, a request for investigation of a member of the bar. An attorney shall not charge or collect a fee in connection with answering a request for investigation unless he or she is acting as counsel for a respondent in connection with a disciplinary investigation or proceeding.

(C) Duty to Assist Administrator. An attorney other than a respondent or respondent's attorney shall ~~assist~~ cooperate with the administrator in the investigation, prosecution, and disposition of a request for investigation or ~~complaint~~ disciplinary proceeding filed with or by the administrator.

Staff comment: The proposed revisions in this rule would clarify that an attorney who represents a respondent may charge a fee, but attorneys otherwise would be precluded from charging a fee in connection with a disciplinary proceeding.

RULE 9.104. GROUNDS FOR DISCIPLINE IN GENERAL~~, ADJUDICATION ELSEWHERE~~.

Alternative A (AGC Proposal)	Alternative B (SBM Proposal)
(A) The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:	~~(A)~~ The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:
(1) conduct prejudicial to the proper administration of justice;	~~(1) conduct prejudicial to the proper administration of justice;~~
~~(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;~~	~~(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;~~
(3) conduct that is contrary to justice, ethics, honesty, or good morals;	~~(3) conduct that is contrary to justice, ethics, honesty, or good morals;~~

~~(4) conduct that violates the standards or rules of professional~~ conduct ~~responsibility~~ adopted by the Supreme Court;	~~(4)~~(A) conduct that violates the standards or rules of professional ~~responsibility~~ conduct adopted by the Supreme Court;
(5) conduct that violates a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615;	~~(5) conduct that violates a criminal law of a state or of the United States;~~
(6) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;	~~(6)~~(B) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;
(7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);	~~(7)~~(C) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);
(8) contempt of the board or a hearing panel; ~~or~~	~~(8)~~(D) contempt of the board or a hearing panel; or
(9) violation of an order of discipline; or	~~(9)~~(E) violation of an order of discipline.
(10) entering into an agreement or attempting to obtain an agreement, that:	
(a) the professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the administrator;	
(b) the plaintiff shall withdraw a request for investigation or shall not cooperate with the investigation or prosecution of misconduct by the administrator; or	
(c) the record of any civil action for professional misconduct shall be sealed from review by the administrator.	

(B) It is also misconduct and a ground for discipline if, through multiple acts and omissions, a lawyer demonstrates the absence of fitness to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. MCR 9.103(A). This is misconduct for which discipline can be imposed for the protection of the public, the courts, and the legal profession. MCR 9.105. In proceedings brought under this subrule, prior acts and omissions of the lawyer are admissible.	
~~(B) Proof of an adjudication of in a disciplinary proceeding by another state, or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate misconduct.~~	~~(B) Proof of an adjudication of misconduct in a disciplinary proceeding by another state, or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate.~~

Staff comment: This rule is one area of significant difference between the AGC and the SBM. The SBM recommends restructuring the rule to limit misconduct to behavior that is misconduct as expressed in the Michigan Rules of Professional Conduct or behavior related to a discipline proceeding. The AGC proposal would retain as grounds for discipline various behaviors that are not expressly included in the Michigan Rules of Professional Conduct. In addition, the AGC proposal would

insert two new concepts as grounds for misconduct: an attempt to encourage a client to settle a potential discipline proceeding, and a pattern of behaviors (acts and omissions) even if no discipline was imposed for those acts or omissions individually. The AGC and SBM explanations for their opposing proposals are outlined below.

AGC comment: In the AGC's proposed changes to MCR 9.104(A)(4), the wording has been changed to be in accord with the terminology of the Michigan Rules of Professional Conduct. The proposed change to MCR 9.104(5) reflects that misdemeanor convictions may enter based upon violations of local ordinance, including convictions where the defendant has abused substances such as drunk driving, disorderly conduct, and possession. Additionally, the change to the proposed rule would take cognizance of convictions entered in formalized tribal courts. MCR 9.104(A)(9) clarifies that lawyers may not obstruct justice or attempt to do so by obtaining or seeking an agreement to conceal alleged misconduct.

The Commission recommends inclusion of a new rule under MCR 9.104(B) allowing prior discipline to be charged in the formal complaint. The inclusion of a respondent's prior disciplinary record is to show a pattern of misconduct and goes to the overall issue of the fitness of a recidivist respondent.

MCR 9.104(B) would be moved to MCR 9.120 for purposes of organizational structure.

SBM Workgroup comment: Currently, both the Rules of Professional Conduct (8.4) and the Michigan Court Rules (9.104) articulate grounds for discipline; some provisions are substantially identical, some are distinctly different; and some could be interpreted as describing the same general grounds in different ways or describing different conduct. The Workgroup favors restricting 9.104 disciplinary grounds to those pertinent to the disciplinary process itself and otherwise referring to and relying exclusively upon grounds set forth in the Rules of Professional Conduct as the general basis for disciplinary action. As a result, the workgroup's version of 9.104 deletes the current paragraphs (A)(1), (2), (3), and (5).

The Workgroup rejected what is contained in the AGC Version as a new paragraph (10), believing that such restrictions were more appropriately placed, if at all, in MRPC 8.3 which deals with reporting misconduct. The Workgroup rejected the AGC-proposed habitual offender rule set forth in a new paragraph (B), believing that (1) the language about "multiple acts and omissions" is overbroad; (2) prior disciplinary history is already a mandatory part of the hearing panel's decisionmaking process admissible at a hearing on sanctions under MCR 9.115(J); and (3) "prior acts and omissions" is overbroad in that those acts themselves are not limited to acts which constitute professional misconduct under any provision of the MRPC.

The AGC objects to the State Bar Workgroup's proposed changes to MCR 9.104, other than moving MCR 9.104(B) to MCR 9.120. The proposed changes weaken the ability of the AGC to prosecute actions and would vitiate case precedent established by the Michigan Supreme Court, such as in *Grievance Adm'r v Fried*, 456 Mich. 234 (1997), in which the

Court held: "The alleged conduct surely exposes the legal profession and the courts to contempt and ridicule—no reasonable person would approve a system in which one can obtain a more lenient judge (and, presumably, a more lenient sentence) in a criminal case by paying $1,000 to a judge's relative. The alleged conduct is contrary to justice, ethics, honesty, and good morals. It is wrong," *Fried*, *id*. at 245. Omission of the provision may result in an inability to bring charges for conduct such as engaging in sexual relations with one's own client. It should be noted that the MRPC does not have an outright ban against such activity although such a ban is included under the ABA's Model Rules.

The proposed changes would substantively affect case law of the Court which confirmed that MCR 9.104(A)(5) allows for the prosecution for any criminal conviction. See *Grievance Adm'r v Deutch and Howell*, 455 Mich 149 (1997). See also *State Bar Grievance Administrator v Gillis*, 402 Mich 286 (1978).

RULE 9.105. PURPOSE AND FUNDING OF DISCIPLINARY PROCEEDINGS.

(A) Purpose. Discipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession. The fact that certain misconduct has remained unchallenged when done by others or when done at other times or has not been earlier made the subject of disciplinary proceedings is not an excuse.

(B) Funding. The legal profession, through the State Bar of Michigan, is responsible for the reasonable and necessary expenses of the board, the commission, and the administrator, as determined by the Supreme Court. ~~Commissioners of the State Bar of Michigan may not represent respondents in proceedings before the board, including preliminary discussions with commission employees prior to the filing of a request for investigation.~~

RULE 9.106. TYPES OF DISCIPLINE; MINIMUM DISCIPLINE;~~ADMONISHMENT~~.

Misconduct is grounds for:

(1) ~~revocation of the license to~~ disbarment of an attorney from the practice of law in Michigan;

(2) suspension of the license to practice law in Michigan for a specified term, not less than 30 days, with such additional conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose, and, if the term exceeds 179 days, until the further order of a hearing panel, the board, or the Supreme Court;

(3) reprimand with such conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose;

(4) probation ordered by a hearing panel, the board, or the Supreme Court under MCR 9.121(C); or

(5) requiring restitution, in an amount set by a hearing panel, the board, or the Supreme Court, as a condition of an order of discipline.~~; or~~

~~(6) with the respondent's consent, admonishment by the commission without filing a complaint. An admonition does not constitute discipline and shall be confidential under MCR 9.126 except as provided by MCR 9.115(J)(3). The administrator shall notify the respondent of the provisions of this rule and the respondent may, within 21 days of service of the~~

~~admonition, notify the commission in writing that respondent objects to the admonition. Upon timely receipt of the written objection, the commission shall vacate the admonition and either dismiss the request for investigation or authorize the filing of a complaint.~~

Staff comment: The reference to admonishment in this rule would be moved to MCR 9.114 to emphasize that an admonishment is not discipline.

RULE 9.107. RULES EXCLUSIVE ON DISCIPLINE.

(A) Proceedings for Discipline. Subchapter 9.100 governs the procedure to discipline attorneys. A proceeding under subchapter 9.100 is subject to the superintending control of the Supreme Court. An investigation or proceeding may not be held invalid because of a nonprejudicial irregularity or an error not resulting in a miscarriage of justice.

(B) Local Bar Associations. A local bar association may not conduct a separate proceeding to discipline an attorney~~, but must assist and cooperate with the administrator in reporting and investigating alleged misconduct of an attorney~~.

Staff comment: Local bar associations do not investigate alleged misconduct of an attorney, so the proposal would eliminate the language.

RULE 9.108. ATTORNEY GRIEVANCE COMMISSION.

(A) Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys and those temporarily admitted to practice under MCR 8.126 or otherwise subject to the disciplinary authority of the Supreme Court.

(B) Composition. The commission consists of 3 laypersons and 6 attorneys appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.

(C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the commission a chairperson and a vice-chairperson who shall serve 1-year terms in those offices. The commencement and termination dates for the 1-year terms shall coincide appropriately with the 3-year membership terms of those officers and the other commission members. The Supreme Court may reappoint these officers for additional terms and may remove these officers prior to the expiration of a term. An officer appointed to fill a mid-term vacancy shall serve the remainder of that term and may be reappointed to serve ~~a full term~~ up to 2 more full terms.

(D) Internal Rules.

(1) The commission must elect annually from among its membership a secretary to keep the minutes of the commission's meetings and issue the required notices.

(2) Five members constitute a quorum. The commission acts by majority vote of the members ~~present~~ participating in the meeting.

(3) The commission must meet monthly at a time and place the chairperson designates. Notice of a regular monthly meeting is not required.

(4) A special meeting may be called by the chairperson or by petition of 3 commission members on 7 days' written notice. The notice may be waived in writing or by attending the meeting. Special meetings may be conducted through electronic means.

(E) Powers and Duties. The commission has the power and duty to:

(1) recommend attorneys to the Supreme Court for appointment as administrator and deputy administrator;

(2) supervise the investigation of attorney misconduct, including requests for investigation of and complaints against attorneys;

(3) supervise the administrator ~~and his or her staff~~;

(4) seek an injunction from the Supreme Court against an attorney's misconduct when prompt action is required, even if a disciplinary proceeding concerning that conduct is not pending before the board;

(5) annually ~~write~~ propose a budget for the commission and the administrator's office, ~~(~~including compensation,~~)~~ and submit it to the Supreme Court for approval;

(6) submit to the Supreme Court proposed changes in these rules;

~~(7) report to the Supreme Court at least quarterly regarding its activities, and to submit a joint annual report with the Attorney Discipline Board that summarizes the activities of both agencies during the past year; and~~

~~(8)~~(7) compile and maintain a list of out-of-state attorneys who have been admitted to practice temporarily and the dates those attorneys were admitted, and otherwise comply with the requirements of MCR 8.126, and

~~(9)~~(8)perform other duties provided in these rules.

Staff comment: The proposal would make primarily technical changes to the rule.

RULE 9.109. GRIEVANCE ADMINISTRATOR.

(A) Appointment. The administrator and the deputy administrator must be attorneys. The commission may ~~shall~~ recommend one or more candidates for appointment as administrator and deputy administrator. The Supreme Court shall appoint the administrator and the deputy administrator, may terminate their appointments at any time with or without cause, and shall determine their salaries and the other terms and conditions of their employment.

(B) Powers and Duties. The administrator has the power and duty to:

(1) employ or retain attorneys, investigators, and staff with the approval of the commission;

(2) supervise the attorneys, investigators, and staff;

(3) assist the public in preparing requests for investigation;

(4) maintain the commission records created as a result of these rules;

(5) investigate alleged misconduct of attorneys, including ~~serving a request for~~ initiating an investigation in his or her own name if necessary;

(6) prosecute complaints the commission authorizes;

(7) prosecute or defend reviews and appeals as the commission authorizes; ~~and~~

(8) report to the Supreme Court at least quarterly regarding the commission's activities, and to submit a joint annual report with the board that summarizes the activities of both agencies during the past year; and

~~(8)~~ (9) perform other duties provided in these rules or assigned by the commission.

(C) Legal Counsel for the Administrator.

(1) The administrator may appoint and retain volunteer legal counsel needed to prosecute proceedings under these rules.

(2) Legal counsel may

(a) ~~prepare and file complaints and notices of hearings~~ commence disciplinary proceedings by filing pleadings or notices;

(b) present evidence relating to ~~complaints or petitions for reinstatement~~ disciplinary and court proceedings;

(c) prepare and file arguments and briefs;

(d) inform the administrator about the progress of cases assigned; and

(e) perform other duties assigned by the administrator.

Staff comment: The proposal would make primarily technical changes to the rule.

RULE 9.110. ATTORNEY DISCIPLINE BOARD.

(A) Authority of Board. The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys and those temporarily admitted to practice under MCR 8.126 or otherwise subject to the disciplinary authority of the Supreme Court.

(B) Composition. The board consists of 6 attorneys and 3 laypersons appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.

(C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the board a chairperson and a vice-chairperson who shall serve 1-year terms in those offices. The commencement and termination dates of the 1-year terms shall coincide appropriately with the 3-year board terms of those officers and the other board members. The Supreme Court may reappoint these officers for additional terms and may remove an officer prior to the expiration of a term. An officer appointed to fill a midterm vacancy shall serve the remainder of that term and may be reappointed to serve two ~~a~~ full terms.

(D) Internal Rules.

(1) The board must elect annually from among its membership a secretary to supervise the keeping of the minutes of the board's meetings and the issuance of the required notices.

(2) Five members constitute a quorum. The board acts by a majority vote of the members present.

(3) The board shall meet monthly as often as necessary to maintain a current docket, but no less than every 2 months, at a time and place the chairperson designates.

(4) A special meeting may be called by the chairperson or by petition of 3 board members on 7 days' written notice. The notice may be waived in writing or by attending the meeting.

(E) Powers and Duties. The board has the power and duty to:

(1) appoint an attorney to serve as its general counsel and executive director;

(2) appoint hearing panels, ~~and~~ masters, monitors, and mentors;

(3) assign a ~~complaint~~ disciplinary proceeding to a hearing panel or to a master;

(4) on request of the respondent, the administrator, or the complainant, review a final order of discipline or dismissal by a hearing panel;

(5) on request of the administrator or respondent, review a petition for leave to appeal and a petition for leave to review a nonfinal order;

~~(5)~~(6) discipline and reinstate attorneys under these rules and exercise continuing jurisdiction over orders of discipline and reinstatement;

~~(6)~~(7) file with the Supreme Court clerk its orders of suspension, disbarment, and reinstatement;

~~(7)~~(8) annually propose ~~write~~ a budget for the board and submit it to the Supreme Court for approval;

~~(8)~~(9) report to the Supreme Court at least quarterly regarding its activities, and to submit a joint annual report with the Attorney Grievance Commission that summarizes the activities of both agencies during the past year; and

~~(9)~~(10) submit to the Supreme Court proposed changes in these rules.

Staff comment: The proposal would make various technical changes in the rule, and would introduce the concept of monitors and mentors that would be appointed by the board to oversee or assist an attorney. The proposal also would allow for an interlocutory-type appeal procedure.

RULE 9.111. HEARING PANELS.

(A) Composition; Quorum. The board must establish hearing panels from a list of volunteer lawyers maintained by its executive director. The board must annually appoint 3 attorneys to each hearing panel and must fill a vacancy as it occurs. Following appointment, the board may designate the panel's chairperson, vice-chairperson, and secretary. Thereafter, a hearing panel may elect a chairperson, vice-chairperson, and secretary. A hearing panel must convene at the time and place designated by its chairperson or by the board. Two members constitute a quorum. A hearing panel acts by a majority vote. If a panel is unable to reach a majority decision, the matter shall be referred to the board for reassignment to a new panel.

(B) Hearing Panelists or Masters; Discipline.

(1) An attorney shall not be appointed as a hearing panelist or master if he or she:

(a) has ever been the subject of an order that imposes discipline, or

(b) has been admonished or placed on contractual probation within the preceding 5 years.

(2) A hearing panelist or master who becomes the subject of an order imposing discipline, an admonition, or placement on contractual proba-

tion shall be removed from the roster of hearing panelists. A hearing panelist or master who becomes the subject of a formal discipline proceeding shall be removed from consideration of any pending matter; shall be placed on the ADB's roster of inactive panelists; and shall not be assigned to a panel until the formal discipline proceeding has been resolved. A hearing panelist or master who becomes the subject of an otherwise confidential request for investigation must disclose that investigation to the parties in the matter before the panelist or master, or must disqualify himself or herself from participation in the matter.

~~(B)~~(C) Powers and Duties. A hearing panel shall do the following:

(1) ~~Hold~~ Schedule a public hearing on a ~~complaint~~ disciplinary proceeding, judgment of conviction, or ~~reinstatement petition~~ reciprocal discipline proceeding assigned to it within 56 days after the ~~date the complaint is filed with the board or the date that notice of the reinstatement petition is published~~ matter is filed with the board. A hearing must be concluded within 91 days after it is begun, unless the board grants an extension for good cause.

(2) Receive evidence and make written findings of fact.

(3) Discipline and reinstate attorneys or dismiss a complaint by order, under these rules and exercise continuing jurisdiction over its orders of discipline and reinstatement.

(4) Report its actions to the board within ~~28 days after the conclusion of a hearing~~ 35 days of the later of the filing of the transcript or the closing of the record, unless extended by the board chairperson.

(5) Perform other duties provided in these rules.

Staff comment: The proposal would incorporate in the rule specific provisions regarding the circumstances under which an attorney subject to discipline could serve on a hearing panel. Time periods would be revised to account for preparation of transcripts, and conform to current practices.

RULE 9.112. REQUESTS FOR INVESTIGATION.

(A) Availability to Public. The administrator shall furnish a form for a request for investigation to a person who alleges misconduct against an attorney. ~~Forms must be available to the public through each state bar office and county clerk's office~~. Use of the form is not required for filing a request for investigation.

(B) Form of Request. A request for investigation of alleged misconduct must

(1) be in writing;

(2) describe the alleged misconduct, including the approximate time and place of it;

(3) be signed by the complainant; and

(4) be filed with the administrator.

(C) Handling by Administrator.

(1) Request for Investigation of Attorney. After ~~making~~ a preliminary review ~~investigation~~, the administrator shall either

(a) notify the complainant and the respondent that the allegations of the request for investigation are inadequate, incomplete, or insufficient to warrant the further attention of the commission; or

(b) serve a copy of the request for investigation on the respondent by ordinary mail at the respondent's address on file with the ~~S~~state ~~B~~bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. Service is effective at the time of mailing, and nondelivery does not affect the validity of service. If a respondent has not filed an answer, no formal complaint shall be filed with the board unless the administrator has served the request for investigation by registered or certified mail return receipt requested.

(2) Request for Investigation of Judge. The administrator shall forward to the Judicial Tenure Commission a request for investigation of a judge, even if the request arises from the judge's conduct before he or she became a judge or from conduct unconnected with his or her judicial office. MCR 9.116 thereafter governs.

(3) Request for Investigation of Member or Employee of Commission or Board. Except as modified by MCR 9.131, MCR 9.104-9.130 apply to a request for investigation of an attorney who is a member of or is employed by the board or the commission.

(D) Subpoenas.

(1) After the request for investigation has been served on the respondent, the commission may issue subpoenas to require the appearance of a witness or the production of documents or other tangible things concerning matters then under investigation. Upon request filed with the board, the board chairperson may quash or modify the subpoena if compliance would be unreasonable or oppressive. Documents or other tangible things so produced may be retained by the grievance administrator, copied, or may be subjected to nondestructive testing. Subpoenas shall be returnable before the administrator or a person designated by the administrator.

(2) A person who without just cause, after being commanded by a subpoena, fails or refuses to appear or give evidence, to be sworn or affirmed, or to answer a proper question after being ordered to do so is in contempt. The administrator may initiate a contempt proceeding before the board chairperson or his or her designee, or under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred. In the event of a finding of contempt by the respondent, the respondent's license to practice law may be suspended until he or she complies with the order of the board chairperson or his or her designee.

(3) A subpoena issued pursuant to this subrule and certified by the commission chairperson shall be sufficient authorization for taking a deposition or seeking the production of evidence outside the State of Michigan. If the deponent or the person possessing the subpoenaed evidence will not comply voluntarily, the proponent of the subpoena may utilize MCR 2.305(D) or any similar provision in a statute or court rule of Michigan or of the state, territory, or country where the deponent or possessor resides or is present.

(4) Upon receipt of a subpoena certified to be duly issued under the rules or laws of another lawyer disciplinary or admissions jurisdiction, the administrator may issue a subpoena directing a person domiciled or

found within the state of Michigan to give testimony and/or produce documents or other things for use in the other lawyer disciplinary proceedings as directed in the subpoena of the other jurisdiction. The practice and procedure applicable to subpoenas issued under this subdivision shall be that of the other jurisdiction, except that:

(a) the testimony or production shall be only in the county where the person resides or is employed, or as otherwise fixed by the grievance administrator for good cause shown; and,

(b) compliance with any subpoena issued pursuant to this subdivision and contempt for failure in this respect shall be sought as elsewhere provided in this subchapter.

Alternative A (AGC Proposal)	Alternative B (SBM Proposal)
(E) Access to Medical and Psychological Records. (1) After the request for investigation has been served on the respondent, and where there is a genuine issue as to a material fact concerning the physical, mental, or emotional condition of the respondent, the administrator may demand the respondent waive applicable privileges and permit the administrator access to existing records concerning the physical, mental, or emotional condition of the respondent. The release of information will take place in accordance with MCR 2.314(D). (2) Upon the conviction of an attorney, and upon the grievance administrator's request, the court shall release to the grievance administrator a copy of any substance abuse assessments or psychological reports received by the probation department during the criminal action.	[The state bar did not submit proposed language in this subrule, opposes the AGC's proposed language in Alternative A, and would not publish it for comment.]

(3) After the request for investigation has been served on the respondent, and where it appears that the respondent is not fit to engage in the practice of law, the administrator may request the respondent to submit to one or more independent examinations by licensed professionals of the administrator's choosing, at the administrator's expense. Where the respondent complies with such a request, the respondent may also be further examined by one or more licensed professionals of the respondent's choosing, at the respondent's expense. (4) When an examination is conducted pursuant to MCR 9.112(E)(3), the licensed professional must provide the administrator and the respondent with copies of the professional's report within 28 days. The report will include a copy of the professional's résumé, an account of the history obtained from the respondent, a description of administered tests and their results, a diagnosis, a prognosis, and recommendations regarding treatment. (5) All records and reports gathered under MCR 9.112(E) are admissible for one year in disciplinary proceedings against the respondent and, after their admission into the record, shall be retained in camera.	

(6) When a respondent refuses to comply with a demand by the administrator under MCR 9.112(E)(1) or (2), in a case in which the administrator has initiated formal proceedings, the hearing panel shall review the evidence and all legitimate inferences regarding the relevant physical, mental, or emotional condition of the respondent in the light most favorable to the administrator.	

Staff comment: The first part of the proposed amendments of this rule would make primarily technical changes, and also would allow a respondent's license to practice to be suspended upon a finding of contempt by the board chairperson or designee. The proposal further would allow the administrator to issue a subpoena directing a person in Michigan to provide testimony or produce documents or other materials for use in another jurisdiction's lawyer disciplinary proceeding. Finally, the AGC recommends adoption of specific language providing for access to medical and psychological records and establishing a procedure under which the Grievance Administrator may request that the respondent submit to one or more independent medical examinations. If the respondent refuses to comply with the administrator's demand, the hearing panel would be required to review the evidence regarding the respondent's physical or mental health in a light most favorable to the administrator.

AGC comment: MCR 9.112(E) is proposed by the AGC because of issues of substance abuse, and mental disability affecting the competency of affected lawyers who may be representing the public. The amendment would allow the grievance administrator the opportunity to obtain information on underlying causes of alleged misconduct and whether the lawyer is currently fit to represent the public. Failure by a respondent to comply with a demand by the grievance administrator to provide medical or psychological information shall, in any subsequent disciplinary proceedings that may be filed following the refusal, result in an evidentiary inference concerning the refusal.

SBM Workgroup comment: The AGC version's proposed addition of paragraph (E) was wholly rejected by all members of the Workgroup other than the representatives from the AGC. The Workgroup believed that a "genuine issue as to a material fact" could be predicated upon simply a disagreement in pleadings between the allegations being made by the grievance administrator and the responsive pleading and that, given that there was no mechanism in the rule for contesting the language mandating a waiver of privilege or confidentiality associated with medical records based on the perceived "genuine issue as to a material fact," the AGC's proposal

was draconian and could readily result in an inappropriate abrogation of privacy rights in medical information. The Workgroup believes that it is improper to establish an irrebuttable inference about the respondent's physical, mental, or emotional condition as a necessary consequence of a refusal to comply with a demand made pursuant to paragraph (E) (1) or (2) when there is not elsewhere any mechanism for challenging the legitimacy of the demand. The Workgroup developed language spelling out a procedure for securing an independent medical examination, which is set forth in MCR 9.121(B)(1)(a).

RULE 9.113. ANSWER BY RESPONDENT.

(A) Answer. Within 21 days after being served with a request for investigation under MCR 9.112(C)(1)(b) or such further time as permitted by the administrator, the respondent shall file with the administrator a ~~signed,~~ written answer signed by respondent in duplicate fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct. ~~The administration may allow further time to answer.~~ Misrepresentation in the answer is grounds for discipline. Respondent's signature constitutes verification that he or she has read the document. The administrator shall provide a copy of the answer and any supporting documents, or documents related to a refusal to answer under MCR 9.113(B)(1), to the person who filed the request for investigation unless the administrator determines that there is cause for not disclosing some or all of the documents.

(B) Refusal or Failure to Answer.

(1) A respondent may refuse to answer a request for investigation on expressed constitutional or professional grounds.

(2) The failure of a respondent to answer within the time period required under these rules other than as permitted in subrule (B)(1) or as further permitted by the administrator is misconduct. See MCR 9.104(A)(7).

Alternative A (AGC Proposal)	Alternative B (SBM Proposal)
(3) If a respondent refuses to answer under subrule (B)(1), the refusal may be submitted under seal to the board ~~a hearing panel~~ for adjudication. If the board finds that the refusal was not proper, it shall direct the attorney to answer the request for investigation within 21 days of its order. The board may order that the respondent's license shall be suspended until further order if he or she does not file an answer to the request for investigation within the 21-day period.	(3) If a respondent refuses to answer under subrule (B)(1), the refusal may be submitted under seal to a hearing panel for adjudication. If a panel finds that the refusal was not proper, it shall direct the attorney to answer the request for investigation within 21 days of its order.

(C) Attorney-Client Privilege. A person who files a request for investigation of an attorney irrevocably waives any attorney-client privilege that he or she may have as to matters relating to the request for the purposes of the commission's investigation.

(D) Representation by Attorney. The respondent may be represented by an attorney.

Staff comment: The proposed changes in this rule would make primarily technical and clarifying updates. The alternative versions of subsection (B)(3) reflect the AGC's intent that the board adjudicate claims that a respondent failed to answer on constitutional grounds, while the SBM workgroup believes such decision should be made by a hearing panel. The AGC version also includes language that would allow the board to suspend an attorney's license for failure to file an answer to a request for investigation within 21 days.

RULE 9.114. ACTION BY ADMINISTRATOR OR COMMISSION AFTER ANSWER.

(A) Action After Investigation. After an answer is filed or the time for filing an answer has expired, the administrator may ~~assign the matter for further investigation, including, if necessary, an informal hearing. When the investigation is complete, the administrator shall either~~

(1) dismiss the request for investigation and notify the complainant and the respondent of the reasons for the dismissal, ~~or~~

(2) conduct further investigation. Upon completion of the investigation, the grievance administrator shall refer the matter to the commission for its review. The commission may direct that a complaint be filed, that the file be closed ~~request be dismissed~~, ~~or~~ that the respondent be admonished or placed on contractual probation with the respondent's consent~~.~~ , or

(3) close a file administratively where warranted under the circumstances.

(B) Admonition. With a respondent's consent, a respondent may be admonished by the commission without filing a complaint. An admonition does not constitute discipline and shall be confidential except as provided by this rule, MCR 9.115(J)(3) and by MCR 9.126(D)(4).

(1) The administrator shall notify the respondent of the provisions of this rule by ordinary mail at the respondent's address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan, or as otherwise directed by respondent.

(2) The respondent may, within 21 days of service of the admonition or such additional time as permitted by the administrator, notify the commission in writing that respondent objects to the admonition. Upon timely receipt of the written objection, the commission shall vacate the admonition and either dismiss the request for investigation or authorize the filing of a complaint. Failure of a respondent to object constitutes an acceptance.

Alternative A (AGC Proposal)	Alternative B (SBM Proposal)
(3) At the time an admonishment becomes effective, if a respondent is known to be employed (other than as a sole legal practitioner), the administrator shall send a copy of the admonishment to the respondent's employer by regular mail. Individual legal clients of the respondent, other than the complainant who initiated the investigation resulting in the admonishment, shall not be provided copies of the admonishment.	[The state bar did not submit proposed language in this subrule, opposes the AGC's proposed language, and would not include it in the published version.]

~~(B)~~(C) Contractual Probation. For purposes of this subrule, "contractual probation" means the placement of a consenting respondent on probation by the commission, without the filing of formal charges. Contractual probation does not constitute discipline, and shall be confidential under MCR 9.126 except as provided by MCR 9.115(J)(3).

(1) If the commission finds that the alleged misconduct, if proven, would not result in disbarment or a substantial suspension ~~or revocation~~ of a respondent's license to practice law, the commission may defer disposition of the matter and place the respondent on contractual probation for a period not to exceed ~~two~~three years, provided the following criteria are met.

(a) the misconduct is significantly related to a respondent's substance abuse problem~~, of the respondent~~ or mental or physical infirmity or disability,

(b) the terms and conditions of the contractual probation, which shall include an appropriate period of treatment, are agreed upon by the commission ~~grievance administrator~~ and the respondent ~~prior to submission to the commission for consideration~~, and,

(c) the commission determines that contractual probation is appropriate and in the best interests of the public, the courts, the legal profession, and the respondent.

(2) A contractual probation may include one or more of these requirements:

(a) Periodic alcohol or drug testing.

(b) Attendance at support-group or comparable meetings.

(c) Professional counseling on a regular basis.

(d) An initial written diagnosis and prognosis by the provider followed by quarterly verification of treatment by the provider as agreed upon by

the commission and the respondent. The provider shall notify the commission of any failure to adhere to the treatment plan.

~~(2)~~(3) The respondent is responsible for any costs associated with the contractual probation and related treatment.

~~(3)~~(4) Upon written notice to the respondent and an opportunity to file written objections, the commission may terminate the contractual probation and file ~~a complaint~~ disciplinary proceedings or take other appropriate action based on the misconduct, if

(a) the respondent fails to satisfactorily complete the terms and conditions of the contractual probation, or

(b) the commission concludes that the respondent has committed other misconduct that warrants the filing of a formal complaint.

~~(4)~~(5) The placing of a respondent on contractual probation shall constitute a final disposition that entitles the complainant to notice in accordance with MCR 9.114(D), and to file an action in accordance with MCR 9.122(A)(2).

~~(C)~~(D) Assistance of Law Enforcement Agencies. The administrator may request a law enforcement office to assist in an investigation by furnishing all available information about the respondent. Law enforcement officers are requested to comply promptly with each request.

(E) Assistance of Courts. If the grievance administrator determines that a non-public court file exists, including files on expunged convictions, and that it is relevant to a pending investigation concerning a respondent attorney, the administrator may request that a court release to the Attorney Grievance Commission the nonpublic court file. Courts are requested to comply promptly with each request.

~~(D)~~(F) Report by Administrator. The administrator shall inform the complainant and, if the respondent answered, the respondent, of the final disposition of every request for investigation ~~dismissed by the commission without a hearing before a hearing panel~~.

~~(E)~~(G) Retention of Records. All files and records relating to allegations of misconduct by an attorney must be retained by the commission for the lifetime of the attorney, except as follows:

(1) Where 3 years have passed from the conclusion of formal disciplinary action or the issuance of an admonishment, non-essential documents may be discarded.

~~(1)~~(2) The administrator may destroy the files or records relating to a closed or dismissed request for investigation ~~dismissed by the commission~~ after 3 years have elapsed from the date of dismissal or closing.

~~(2)~~(3) If no request for investigation was pending when the files or records were created or acquired, and no related request for investigation was filed subsequently, the administrator may destroy the files or records after ~~3 years have~~ 1 year has elapsed from the date when they were created or acquired by the commission.

Staff comment: The proposal regarding this rule includes various technical updates that would make the rule reflect current practice. Provisions related to admonishment would be inserted here. The AGC version includes notice of admonishment to the attorney's employer, while there is no such provision recommended by the SBM workgroup.

The AGC version originally included a notice requirement only if the attorney was employed in a legal capacity by a firm, agency, or other organization, but the Court for purposes of publication revised the language to require notice to any employer, regardless of the attorney's type of work.

AGC comment: The AGC's proposed changes to paragraph (A) are made to reflect current practices. The amendment deletes language relating to "informal hearings" as outmoded. The remainder of the changes to paragraph (A) reflect current terminology and practices at the AGC. Files that have been reviewed by the commission are closed rather than dismissed. Where a file is closed "with a caution," that file is still closed but there is simply language added to the closing letter for educational purposes, only. The file remains a closed file.

It is the administrator, not the Commission, that sometimes will close a file administratively. This administrative closure may occur in instances where the respondent has died, or a file has been opened in error, etc. The amendments further reflect the stages of review in files where the attorney is required to file an answer.

Language pertaining to admonitions has been moved from MCR 9.106 to paragraph (B), consistent with the notion that an admonition is not a discipline. Language in paragraph (B)(1) was added to specify the means to be utilized in notifying a respondent of the admonition. If the requisite twenty-one days from notice elapses and the respondent does not object, paragraph (B)(2) specifies that silence constitutes an acceptance of the admonition. Finally, under added rule MCR 9.114(B)(3), a copy of the admonishment is to be sent to a respondent's employer to enable the employer to conduct appropriate supervision.

Relettered paragraph (C) relating to contractual probation as proposed specifies some of the conditions that are currently included in standardized contractual probation agreements. The AGC also recommends more expansive language, enabling the AGC to offer contractual probation to attorneys who are at the beginning stage of a substance problem as well as those suffering from a mental or emotional disability. Because contractual probation is by consent, an attorney does not have to agree to it.

Paragraph (D) is renumbered from MCR 9.114(E). Paragraph (E) has been included to allow the administrator access to non-public files involving attorneys. Paragraph (F) as proposed reflects actual practice. Paragraph (G) allows the AGC to discard non-essential documents based upon certain time elements.

SBM Workgroup comment: The format of paragraphs (A)(1), (2), and (3) adopted by the Workgroup, including the last paragraph which sets apart closing a file administratively where warranted, were consistent with an earlier AGC draft, with the exception that the Workgroup rejected setting out "closed with a caution" as a separate category. The Workgroup believed that the existing category of options were sufficient without adding another type of dismissal. The Workgroup also found inappropriate the language directing that admonishments, which are confidential, be sent to a respondent's "employer". In a law firm setting, identifying who constitutes the "employer" might be difficult. Consider-

ing that an admonishment is not a "discipline" and does not impact or impair a lawyer's ability to practice law, no meaningful purpose for notifying the employer exists other than simply "outing" the respondent.

Members of the Workgroup also expressed a belief that, where the grievance administrator believes an admonishment is the appropriate outcome in a given set of circumstances, a respondent's knowledge that his or her employer will be made aware of the admonishment might render settlement on that basis more difficult.

The reference in paragraph (B) to MCR 9.126(D)(4) is consistent with an earlier AGC draft. The current AGC version's reference to MCR 9.126 was not discussed with the Workgroup but likely would have been found workable.

The Workgroup specifically rejected the AGC's proposal to increase the maximum length of probation from two years to three years, which is set forth in relettered paragraph (C)(1).

There is no substantive distinction between the Workgroup and AGC versions of paragraph (G)(2). The Workgroup version presumes that any file that is dismissed will thereafter be closed, so that there is no reason to describe both categories separately.

RULE 9.115. HEARING PANEL PROCEDURE.

(A) Rules Applicable. Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel. Pleadings must conform as nearly as practicable to the requirements of subchapter 2.100. The original of the formal complaint and all other pleadings must be filed with the board. The formal complaint must be served on the respondent. All other pleadings must be served on the opposing party and each member of the hearing panel. Proof of service of the formal complaint may be filed at any time prior to the date of the hearing. Proof of service of all other pleadings must be filed with the original pleadings.

(B) Complaint. Except as provided by MCR 9.120, a complaint setting forth the facts of the alleged misconduct begins proceedings before a hearing panel. The administrator shall prepare the complaint, file it with the board, and serve it on the respondent and~~,~~ a ~~if the~~ respondent's employer ~~is a member of or is associated with a law firm, on the firm~~. The unwillingness of a complainant to proceed ~~prosecute~~, or a settlement between the complainant and the respondent, does not itself affect the right of the administrator to proceed.

(C) Service. Service of the complaint ~~and all subsequent pleadings and orders~~ and a default must be made by personal service or by registered or certified mail addressed to the person at the person's last known address. An attorney's last known address is the address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. A respondent's attorney of record must also be served, but service may be made under MCR 2.107. Service is effective at the time of mailing, and nondelivery does not affect the validity of the service.

(D) Answer.

(1) ~~Within 21 days after the complaint is served, the respondent shall file and serve a signed answer as provided in subrule (A).~~ A respondent

must serve and file a signed answer or take other action permitted by law or these rules within 21 days after being served with the complaint in the manner provided in MCR 9.115(C). A signature constitutes verification that the respondent has read the answer or other response.

(2) A default, with the same effect as a default in a civil action, may enter against a respondent who fails within the time permitted to file an answer admitting, denying, or explaining the complaint, or asserting the grounds for failing to do so.

(E) Representation by an Attorney. The respondent may be represented by an attorney, who must enter an appearance, which has the same effect as an appearance under MCR 2.117.

(F) Prehearing Procedure.

(1) Extensions. If good cause is shown, the hearing panel chairperson may grant one extension of time per party for filing pleadings and may grant one adjournment per party. Additional requests may be granted by the board chairperson if good cause is shown. Pending criminal or civil litigation of substantial similarity to the allegations of the complaint is not necessarily grounds for an adjournment.

(2) Motion to Disqualify.

(a) Within 14 days after an answer has been filed or the time for filing the answer has expired, each member of the hearing panel shall disclose in a writing filed with the board any information that the member believes could be grounds for disqualification under the guidelines of MCR 2.003~~(B)~~(C), including pending requests for investigation filed against the member. The duty to disclose shall be a continuing one. The board shall serve a copy of the disclosure on each party and each panel member.

(b) ~~Within 14 days after the board serves a copy of a written disclosure, the respondent or the administrator may move to disqualify a member of the hearing panel.~~ A motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the hearing date, the motion must be made forthwith. If a motion is not timely filed, untimeliness is a factor in deciding whether the motion should be granted. All known grounds for disqualification must be included at the time the motion is filed. An affidavit must accompany the motion. The board chairperson shall decide the motion under the guidelines of MCR 2.003.

(c) The board must assign a substitute for a disqualified member of a hearing panel. If all are disqualified, the board must reassign the complaint to another panel.

(3) Amendment of Pleadings. The administrator and the respondent each may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by the opposing party, or within 15 days after serving the pleading if it does not require a responsive pleading. Otherwise, a party may amend a pleading only by leave granted by the hearing panel chairperson or with the written consent of the adverse party.

(4) Discovery. Pretrial or discovery proceedings are not permitted, except as follows:

(a) Within 21 days ~~of~~ after the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection or copying. Within 14 days after service of a written demand, the documents shall be made available, provided that the administrator need not comply prior to the filing of the respondent's answer; in such case, the administrator shall comply with the written demand within 14 days ~~of~~ after the filing of the respondent's answer. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Any other documentary evidence to be introduced at the hearing by either party shall be supplied to the other party no later than 14 days prior to the hearing. Any documentary evidence not so supplied shall be excluded from the hearing except for good cause shown.

~~(b)~~(i) Within 21 days ~~of~~ after the service of a formal complaint, a party may demand in writing that the opposing party supply written notification of the name and address of any person to be called as a witness at the hearing. Within 14 days after the service of a written demand, the notification shall be supplied. However, the administrator need not comply prior to the filing of the respondent's answer to the formal complaint; in such cases, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer to the formal complaint. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Except for good cause shown, a party who is required to give said notification must give supplemental notice to the adverse party within 7 days after any additional witness has been identified, and must give the supplemental notice immediately if the additional witness is identified less than 14 days before a scheduled hearing.

(ii) Within 21 days following the filing of an answer, the administrator and respondent shall exchange the names and addresses of all persons having knowledge of relevant facts and comply with reasonable requests for (1) nonprivileged information and evidence relevant to the charges against the respondent, and (2) other material upon good cause shown to the chair of the hearing panel.

~~Upon receipt of a demand made pursuant to this rule, a party must also provide to the other party any statements given by witnesses to be called at the hearing. Witness statements include stenographic, recorded, or written statements of witnesses provided to the administrator, the respondent, or the respondent's representative. The term "written statement" does not include notes or memoranda prepared by a party or a party's representative of conversations with witnesses, or other privileged information.~~

(b)~~(c)~~ A deposition may be taken of a witness who lives outside the state or is physically unable to attend the hearing. For good cause shown, the hearing panel may allow the parties to depose other witnesses.

(c)~~(d)~~ The hearing panel may order a prehearing conference held before a panel member to obtain admissions or otherwise narrow the issues presented by the pleadings.

If a party fails to comply with subrule (F)(4)(a) or (b), the hearing panel or the board may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).

(5) Discipline by Consent. A respondent may offer to plead ~~nolo contendere~~ no contest or to admit all essential facts contained in the complaint or any of its allegations in exchange for a stated form of discipline and on the condition that the plea or admission and discipline agreed on is accepted by the commission and the hearing panel. The respondent's offer shall first be submitted to the commission. If the offer is accepted by the commission, the administrator and the respondent shall prepare a stipulation for a consent order of discipline that includes all prior discipline, admonishments, and contractual probations, if any, and file the stipulation with the hearing panel. If the stipulation contains any nonpublic information, it shall be filed in camera. ~~At the time of the filing, the administrator shall serve a copy of the proposed stipulation upon the complainant.~~ If the hearing panel approves the stipulation, it shall enter a final order of discipline. If not approved, the offer is deemed withdrawn and statements or stipulations made in connection with the offer are inadmissible in disciplinary proceedings against the respondent and not binding on the respondent or the administrator. If the stipulation is not approved, the matter must then be referred for hearing to a hearing panel other than the one that passed on the proposed discipline.

(G) Hearing Time and Place; Notice. The board or the chairperson of the hearing panel shall set the time and place for a hearing. Notice of a hearing must be served by the board or the chairperson of the hearing panel on the administrator, the respondent, the complainant, and any attorney of record at least 21 days before the initial hearing. Unless the board or the chairperson of the hearing panel otherwise directs, the hearing must be in the county in which the respondent has or last had an office or residence. If the hearing panel fails to convene or complete its hearing within a reasonable time, the board may reassign the complaint to another panel or to a master. A party may file a motion for a change of venue. The motion must be filed with the board and shall be decided by the board chairperson, in part, on the basis of the guidelines in MCR 2.221. Notwithstanding MRE 615, there shall be a presumption that a complainant is entitled to be present during a hearing, which may only be overcome upon a finding by the panel, supported by facts which are particular to the proceeding, that testimony by the complainant is likely to be materially affected by exposure to other testimony at the hearing.

(H) Respondent's Appearance. The respondent shall personally appear at the hearing, unless excused by the panel, and is subject to cross-examination as an opposite party under MCL 600.2161.

(1) Where satisfactory proofs are entered into the record that a respondent possessed actual notice of the proceedings, but who still failed to appear, a panel shall suspend him or her effective 7 days from the date of entry of the order and until further order of the panel or the board.

(2) If the respondent, or the respondent's attorney on his or her behalf, claims physical or mental incapacity as a reason for the respondent's failure to appear before a hearing panel or the board, the panel or the board on its own initiative may, effective immediately, suspend the respondent from the practice of law until further order of the panel or board. The order of suspension must be filed and served as other orders of discipline.

(I) Hearing; Contempt.

(1) A hearing panel may issue subpoenas (including subpoenas for production of documents and other tangible things), cause testimony to be taken under oath, and rule on the admissibility of evidence under the Michigan Rules of Evidence. The oath or affirmation may be administered by a panel member. A subpoena must be issued in the name and under the seal of the board. It must be signed by a panel or board member, by the administrator, or by the respondent or the respondent's attorney. A subpoenaed witness must be paid the same fee and mileage as a witness subpoenaed to testify in the circuit court. Parties must notify their own witnesses of the date, time, and place of the hearing.

(2) A person who without just cause fails or refuses to appear and give evidence as commanded by a subpoena, to be sworn or affirmed, or to answer a proper question after he or she has been ordered to do so, is in contempt. The administrator may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.

(3) Upon a showing of good cause by a party, a panel may permit a witness to testify by telephonic, voice, or video conferencing.

(J) Decision.

(1) The hearing panel must file a report on its decisions regarding the misconduct charges and, if applicable, the resulting discipline. The report must include a certified transcript, a summary of the evidence, pleadings, exhibits and briefs, and findings of fact. The discipline section of the report must also include a summary of all previous misconduct for which the respondent was disciplined, ~~or~~ admonished, or placed on contractual probation.

(2) Upon a finding of misconduct, the hearing panel shall conduct a separate sanction hearing to determine the appropriate discipline. The sanction hearing ~~on discipline~~ shall be conducted as soon after the finding of misconduct as is practicable and may be held immediately following the panel's ruling that misconduct has been established.

(3) If the hearing panel finds that the charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline. The order shall take effect 21 days after it is served on the respondent unless the panel finds good cause for the order to take effect on a different date, in which event the panel's decision must explain the reasons for ordering a different effective date. The discipline ordered may be concurrent or consecutive to other discipline. In determining the discipline to be imposed, any and all relevant evidence of aggravation or mitigation shall be admissible, including, but not limited to, records of the board, previous admonitions ~~and orders of discipline~~, and the previous placement of the respondent on contractual probation.

(4) If the hearing panel finds that the charge of misconduct is not established by a preponderance of the evidence, it must enter an order dismissing the complaint.

(5) The report and order must be signed by the panel chairperson and filed with the board and the administrator. A copy must be served on the parties as required by these rules.

(K) Stay of Discipline. If a discipline order is a suspension of 179 days or less, a stay of the discipline order will automatically issue on the timely filing by the respondent of a petition for review and a petition for a stay of the discipline. If the discipline ordered is more severe than a suspension of 179 days, the respondent may petition the board for a stay pending review of the discipline order. Once granted, a stay remains effective until the further order of the board.

(L) Enforcement. The administrator shall take the necessary steps to enforce a discipline order after it is effective.

(M) Resignation by Respondent; Admission of Charges. An attorney's ~~request that his or her name be stricken from the official register of attorneys~~ resignation may not be accepted while a request for investigation or a complaint is pending, except pursuant to an order of disbarment ~~revocation~~.

Staff comment: Many of the changes proposed in this rule would clarify and update the rule to reflect current practices. The main point of division between the AGC and the SBM workgroup relates to language that occurs in subdivision (F)(4)(b)(2), which would expand the scope of discovery in discipline proceedings. Their comments follow.

AGC comment: The SBM Workgroup proposes a change to paragraph (F)(4)(b)(ii), which would enable respondents to essentially invade AGC files and records. The AGC recommends that no changes be made to the existing rule. Essentially, under this proposed rule, every part of the Commission's file would arguably be accessible. If the SBM version were adopted, each disciplinary proceeding has the potential to result in a discovery battle, with the board deciding whether or not the confidential files and memoranda of its sister agency should be invaded and disclosed to respondents under its subsection (2) "other material upon good cause shown to the chair of the hearing panel." Adoption of the provision proposed by the SBM Workgroup would constitute a *substantive* change to precedent set by this court. See, *Grievance Adm'r v* Attorney Discipline Board Tri-County Hearing Panel No. 69, 447 Mich 1203 (1994), *Grievance Adm'r v Attorney Discipline Bd*., 444 Mich.1218 (1994), *Anonymous v Atty Grievance Comm'n*, 430 Mich 241, 255, (1988).

SBM Workgroup comment: All members of the Workgroup other than the AGC representatives favored expanding discovery beyond simply the exchange of witness names and addresses and a narrowly defined category of witness statements. Particularly absent a requirement upon the grievance administrator to divulge exculpatory material, the lack of any mechanism requiring the identification of persons with knowledge of relevant facts and production of non-privileged, relevant documentation places respondents in the position of receiving differing levels of information depending upon the personal preferences of the grievance administrator attorney assigned the case. Moreover, nationally Michigan is one

of the most restrictive states in affording discovery to respondents in disciplinary proceeding. The modest expansion of discovery procedure set forth in proposed paragraph (F)(4)(b)(ii) would require identification of persons with knowledge of relevant facts and that a party respond to reasonable requests for non-privileged information and evidence relevant to the charges against the respondent and for other material upon good cause shown to the chair of the hearing panel.

The AGC version reverts to the current language, which in operation permits the grievance administrator attorney to defeat a respondent's ability to obtain information about a witness's anticipated testimony by simply not having the witness write anything down. The Workgroup does not believe the proposed changes would result in a discovery battle in every case and it goes without saying that a former precedent upholding the language currently in place would no longer have application once the new rule is in place.

The "for good cause shown" language contained in the AGC's version of paragraph (H) was not presented to or discussed by the Workgroup.

RULE 9.116. JUDGES; FORMER JUDGES~~HEARING PROCEDURE ; JUDGES OTHER THAN MAGISTRATES AND REFEREES~~.

~~(A) Application of this Rule. This rule governs an action by the commission against a judge, except that it does not apply to an action against a magistrate or referee for misconduct separately arising from the practice of law, whether before or during the period when the person serves as a magistrate or referee.~~

~~(B) Time. The commission may not take action against a judge unless and until the Judicial Tenure Commission recommends a sanction. Then, notwithstanding the pendency of certification to and review by the Supreme Court of the Judicial Tenure Commission's action, the commission may, without an investigation, direct the administrator to file a complaint with the board.~~

~~(C) Complaint; Time and Place of Hearing; Answer. The administrator shall file a complaint setting forth the facts of the alleged misconduct within 14 days after the Judicial Tenure Commission files its order with the Supreme Court. The chairperson of the hearing panel assigned by the board shall designate a place and a time for the hearing no later than 21 days after the complaint is filed. The complaint and notice of the hearing must be served within 7 days after the complaint is filed. Within 14 days after the complaint and notice of the hearing are served, the respondent judge shall file an answer.~~

~~(D) Rules Applicable; Judicial Tenure Commission Record. To the extent it is consistent with this rule, MCR 9.115 governs hearing procedure against a respondent judge. The record of the Judicial Tenure Commission proceeding is admissible at the hearing. The administrator or the respondent may introduce additional evidence.~~

~~(E) Decision. Within 28 days after the hearing is concluded, the panel must file with the Supreme Court clerk and the board a report and order conforming with MCR 9.115(J) and serve them on the administrator and the respondent.~~

~~(1) If the Judicial Tenure Commission has recommended suspension, the panel may not disbar the respondent and may not suspend the respondent from practicing law for a period beginning earlier than or extending beyond the suspension period recommended by the Judicial Tenure Commission.~~

~~(2) If the Judicial Tenure Commission has not recommended either suspension or removal from office, and the respondent continues to hold a judicial office, then the panel may not disbar or suspend the respondent.~~

~~(3) If the Judicial Tenure Commission has recommended removal from office, or if the respondent no longer holds a judicial office, then the panel may impose any type of discipline authorized by these rules.~~

~~(F) Appeal. The respondent-judge may file a petition for review under MCR 9.118.~~

(A) Judges. The administrator or commission may not take action against an incumbent judge, except that this rule does not prohibit an action by the administrator or commission against:

(1) a magistrate or referee for misconduct unrelated to judicial functions, whether before or during the period when the person serves as a magistrate or referee; or

(2) a visiting judge as provided in MCR 9.203(E). If the Judicial Tenure Commission receives a request for investigation of a magistrate or referee or visiting judge arising from the practice of law, the Judicial Tenure Commission shall refer the matter to the administrator or commission for investigation in the first instance. If the administrator or the commission dismisses the request for investigation referred by the Judicial Tenure Commission, or a request for investigation of a magistrate, referee or visiting judge submitted directly to the commission by a complainant, the administrator or commission shall notify the Judicial Tenure Commission, which may take action as it deems appropriate.

(B) Former Judges. The administrator or commission may take action against a former judge for conduct resulting in removal as a judge, and for any conduct which was not the subject of a disposition by the Judicial Tenure Commission or by the Court. The administrator or commission may not take action against a former judge for conduct where the court imposed a sanction less than removal or the Judicial Tenure Commission has taken any action under MCR 9.207(B)(1)-(5).

(C) Judicial Tenure Commission Record. The record of the Judicial Tenure Commission proceeding is admissible at a hearing involving a former judge. The administrator or the respondent may introduce additional evidence.

Staff comment: Because it seemed that there may be situations in which the administrator or the commission could act under this rule, the Court published for comment a version that included reference to action by the administrator or the commission. Generally, the amendment would clarify the situations in which the commission could commence an investigation, and when the Judicial Tenure Commission action would take precedence.

AGC comment: The proposed changes to MCR 9.116 delineates that the administrator has jurisdiction to investigate and prosecute magis-

trates and visiting judges for conduct unrelated to the judicial function. The administrator will no longer have concurrent jurisdiction to discipline sitting judges disciplined by the Judicial Tenure Commission (JTC). If a judge has been removed, however, the proposed rule change states that the record of the JTC shall be admitted into the record, which is done to avoid duplication of evidence and unnecessary expenditure of resources.

SBM Workgroup comment: The distinctions between the Workgroup version and the AGC version are minor. The Workgroup version is identical to what the AGC proposed in its original draft. The AGC's later draft substitutes the word "administrator" for "commission" in a number of places, in apparent recognition that the grievance administrator would be the entity undertaking investigation. This is likely a change that, had it been presented to the Workgroup, the Workgroup likely would not have opposed. The substitution of "unrelated to judicial functions" in place of "arising from the practice of law" in paragraph (A)(1) would also probably have been approved by the Workgroup had the AGC presented it. The change to paragraph (C) seems to mandate introduction of the Judicial Tenure Commission proceeding rather than simply paving the way for its introduction by declaring it admissible. This change was also not presented by the AGC to the Workgroup.

RULE 9.118. REVIEW OF ORDER OF HEARING PANEL.

(A) Review of Order; Time.

(1) The administrator, the complainant, or the respondent may petition the board in writing to review the order of a hearing panel filed under MCR 9.113(B), 9.115, 9.116, 9.120, 9.121, or 9.124. The administrator or the respondent may also petition the board for leave to appeal. Upon leave granted, the administrator or the respondent may petition the board to review a nonfinal order. A petition for review must set forth the reasons and the grounds on which review is sought and must be filed with the board within 21 days after the order is served. The petitioner must serve copies of the petition and the accompanying documents on the other party and the complainant and file a proof of service with the board.

(2) A cross-petition for review may be filed within 21 days after the petition for review is served on the cross-petitioner. The cross-petition must be served on the other party and the complainant, and a proof of service must be filed with the board.

(3) A delayed petition for review may be considered by the board chairperson under the guidelines of MCR 7.205(F). If a petition for review is filed more than 12 months after the order of the hearing panel is entered, the petition may not be granted.

(B) Order to Show Cause. If a petition for review is timely filed or a delayed petition for review is accepted for filing, the board shall issue an order to show cause, at a date and time specified, why the order of the hearing panel should not be affirmed. The order shall establish a briefing schedule for all parties and may require that an answer to the petition or cross-petition be filed. An opposing party may file an answer even if the order does not require one. The board must serve the order to show cause on the administrator, respondent, and complainant at least 21 days

before the hearing. Failure to comply with the order to show cause, including, but not limited to, a requirement for briefs, may be grounds for dismissal of a petition for review. Dismissal of a petition for review shall not affect the validity of a cross-petition for review.

(C) Hearing.

(1) A hearing on the order to show cause must be heard by a subboard of at least 3 board members assigned by the chairperson. The board must make a final decision on consideration of the whole record, including a transcript of the presentation made to the subboard and the subboard's recommendation. The respondent shall appear personally at the review hearing unless excused by the board. Failure to appear may result in denial of any relief sought by the respondent, or any other action allowable under MCR 9.118(D).

(2) If the board believes that additional testimony should be taken, it may refer the case to a hearing panel or a master. The panel or the master shall then take the additional testimony and shall make a supplemental report, including a transcript of the additional testimony, pleadings, exhibits, and briefs with the board. Notice of the filing of the supplemental report and a copy of the report must be served as an original report and order of a hearing panel.

(D) Decision. After the hearing on the order to show cause, the board may affirm, amend, reverse, or nullify the order of the hearing panel in whole or in part or order other discipline. A discipline order is not effective until 28 days after it is served on the respondent unless the board finds good cause for the order to take effect earlier.

(E) Motion for Reconsideration; Stay. A motion for reconsideration may be filed at any time before the board's order takes effect. An answer to a motion for reconsideration may be filed. ~~The board may grant a stay pending its decision on a motion for reconsideration.~~ If the discipline order is a suspension for 179 days or less, a stay of the discipline order will automatically issue on the timely filing by the respondent of a motion for reconsideration. If the discipline is greater than a 179-day suspension, the respondent may petition for a stay. If the board grants a stay, the stay remains effective for 28 days after the board enters its order granting or denying reconsideration. ~~In the absence of an order by the board, the filing of a motion for reconsideration does not stay an order of discipline.~~

(F) Filing Orders. The board must file a copy of its discipline order with the Supreme Court clerk and the clerk of the county where the respondent resides and where his or her office is located. The order must be served on all parties. If the respondent requests it in writing, a dismissal order must be similarly filed and served.

Staff comment: The proposed amendments of this rule would allow the administrator or petitioner to seek review of a nonfinal order, and would implement an automatic stay if a motion for reconsideration is filed for a case in which the order of discipline includes a suspension of less than 180 days, which is consistent with MCR 9.122(C).

RULE 9.119. CONDUCT OF DISBARRED, SUSPENDED, OR INACTIVE ATTORNEYS.

(A) Notification to Clients. An attorney ~~whose license is revoked or suspended,~~ who has resigned under Rule 3 of the Rules Concerning the

State Bar of Michigan, or been disbarred, or suspended, or who is transferred to inactive status pursuant to MCR 9.121, or who is suspended for nondisciplinary reasons pursuant to Rule 4 of the Supreme Court Rules Concerning the State Bar of Michigan, shall, within 7 days of the effective date of the order of discipline, resignation, the transfer to inactive status, or the nondisciplinary suspension, notify all ~~of~~ his or her active clients, in writing, by registered or certified mail, return receipt requested, of the following:

(1) the nature and duration of the discipline imposed, the transfer to inactive status, the nondisciplinary suspension, or the resignation;

(2) the effective date of such discipline, transfer to inactive status, nondisciplinary suspension, or resignation;

(3) the attorney's inability to act as an attorney after the effective date of such discipline, transfer to inactive status, nondisciplinary suspension, or resignation;

(4) the location and identity of the custodian of the clients' files and records, which will be made available to them or to substitute counsel;

(5) that the clients may wish to seek legal advice and counsel elsewhere; provided that, if the disbarred, suspended, ~~or~~ inactive, or resigned attorney was a member of a law firm, the firm may continue to represent each client with the client's express written consent;

(6) the address to which all correspondence to the attorney may be addressed.

(B) Conduct in Litigated Matters. In addition to the requirements of subsection (A) of this rule, the affected attorney must, by the effective date of the order of ~~revocation~~ disbarment, suspension, ~~or~~ transfer to inactive status, or resignation, in every matter in which the attorney is representing a client in litigation, file with the tribunal and all parties a notice of the attorney's disqualification from the practice of law. The affected attorney shall either file a motion to withdraw from the representation, or, with the client's knowledge and consent, a substitution of counsel.

(C) Filing of Proof of Compliance. Within 14 days after the effective date of the order of ~~revocation~~ disbarment, suspension, ~~resignation, or~~ transfer to inactive status pursuant to MCR 9.121, or resignation, the disbarred, suspended, ~~or~~ inactive, or resigned attorney shall file with the administrator and the board an affidavit showing full compliance with this rule. The affidavit must include as an appendix copies of the disclosure notices and mailing receipts required under subrules (A) and (B) of this rule. The affidavit must set forth any claim by the affected attorney that he or she does not have active clients at the time of the effective date of the change in status. A disbarred, suspended, ~~or~~ inactive, or resigned attorney shall keep and maintain records of the various steps taken under this rule so that, in any subsequent proceeding instituted by or against him or her, proof of compliance with this rule and with the disbarment or suspension order will be available.

(D) Conduct After Entry of Order Prior to Effective Date. A disbarred or suspended attorney, after entry of the order of ~~revocation~~ disbarment or suspension and prior to its effective date, shall not accept any new retainer or engagement as an attorney for another in any new case or

legal matter of any nature, unless specifically authorized by the board chairperson upon a showing of good cause and a finding that it is not contrary to the interests of the public and profession. However, during the period between the entry of the order and its effective date, the suspended or disbarred attorney may complete, on behalf of any existing client, all matters that were pending on the entry date.

(E) Conduct After Effective Date of Order. An attorney who is disbarred, ~~or~~ suspended, ~~or who is~~ transferred to inactive status pursuant to MCR 9.121, or who resigns is, during the period of disbarment, suspension, or inactivity, or from and after the date of resignation, forbidden from:

(1) practicing law in any form;

(2) having contact either in person, by telephone, or by electronic means, with clients or potential clients of a lawyer or law firm either as a paralegal, law clerk, legal assistant, or lawyer;

(~~2~~3) appearing as an attorney before any court, judge, justice, board, commission, or other public authority; and

(~~3~~4) holding himself or herself out as an attorney by any means.

(F) Compensation of Disbarred, Suspended, Resigned, or Inactive Attorney. An attorney ~~whose license is revoked~~ who has been disbarred or suspended, has resigned, or who is transferred to inactive status pursuant to MCR 9.121 may not share in any legal fees for legal services performed by another attorney during the period of disqualification from the practice of law. A disbarred, suspended, resigned, or inactive attorney may be compensated on a quantum meruit basis for legal services rendered and expenses paid by him or her prior to the effective date of the ~~revocation,~~ disbarment, suspension, resignation, or transfer to inactive status.

(G) ~~Inventory~~ Receivership.

(1) Attorney with a firm. If ~~the~~ an attorney ~~whose license~~ who is a member of a firm is ~~revoked~~ disbarred, ~~or~~ suspended, ~~or who is~~ transferred to inactive status pursuant to MCR 9.121, or resigns his or her license to practice law ~~was a member of a firm~~, the firm may continue to represent each client with the client's express written consent. Copies of the signed consents shall be maintained with the client file.

(2) Attorney practicing alone. If an attorney is transferred to inactive status, resigns, or is disbarred or suspended and fails to give notice under the rule, or disappears, is imprisoned, or dies, and there is no partner, executor, or other responsible person capable of conducting the attorney's affairs, the administrator may ask the chief judge in the judicial circuit in which the attorney maintained his or her practice to appoint a person to act as a receiver with necessary powers, including:

(a) To obtain and inventory the attorney's files;

(b) ~~and to~~ To take any action necessary to protect the interests of the attorney and the attorney's clients~~.~~;

(c) To change the address at which the attorney's mail is delivered and to open the mail; or

(d) To secure (garner) the lawyer's bank accounts.

~~The person appointed may not disclose any information contained in any inventoried file without the client's written consent.~~ The person appointed is analogous to a receiver operating under the direction of the circuit court.

(3) Confidentiality. The person appointed may not disclose to any third parties any information protected by MRPC 1.6 without the client's written consent.

(4) Publication of Notice. Upon receipt of notification from the receiver, the state bar shall publish in the Michigan Bar Journal notice of the receivership, including the name and address of the subject attorney, and the name, address, and telephone number of the receiver.

Staff comment: The proposed changes in this rule would make technical revisions, update the rule to include resignation, and clarify how disbarred, inactive, or resigned attorneys must proceed. The original proposal would have required all requests for appointment of a receiver to be made with the local probate court, but because the probate court would not seem to have jurisdiction in cases where the attorney is imprisoned or simply resigns or becomes inactive, the Court approved a version for publication that retains the current jurisdiction for such appointment in circuit court. Further, because it is typically the Legislature and not the Court that determines filing fee requirements, the AGC's request for a blanket waiver of filing fees and other costs in these types of cases (regardless of the financial situation of the case) was not included in the published version.

RULE 9.120. CONVICTION OF CRIMINAL OFFENSE; RECIPROCAL DISCIPLINE.

(A) Notification of the Grievance Administrator and the Attorney Discipline Board

(1) When a lawyer is convicted of a crime, the lawyer, the prosecutor or other authority who prosecuted the lawyer, and the defense attorney who represented the lawyer must notify the grievance administrator and the board of the conviction. This notice must be given in writing within 14 days after the conviction.

(2) A lawyer who has been the subject of an order of discipline or transferred to inactive status by any court of record or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys, of the United States, or of any state or territory of the United States or of the District of Columbia, or who has resigned from the bar or roster of attorneys in lieu of discipline by, or during the pendency of, discipline proceedings before such court or body shall inform the grievance administrator and board of entry of such order, transfer, or resignation within 14 days of the entry of the order, transfer, or resignation.

(B) ~~Suspension.~~ Criminal Conviction.

(1) On conviction of a felony, an attorney is automatically suspended until the effective date of an order filed by a hearing panel under MCR 9.115(J). A conviction occurs upon the return of a verdict of guilty or upon the acceptance of a plea of guilty or nolo contendere. The board may, on the attorney's motion, set aside the automatic suspension when it appears consistent with the maintenance of the integrity and honor of

the profession, the protection of the public, and the interests of justice. The board must set aside the automatic suspension if the felony conviction is vacated, reversed, or otherwise set aside for any reason by the trial court or an appellate court.

(2) In a disciplinary proceeding instituted against an attorney based on the attorney's conviction of a criminal offense, a certified copy of the judgment of conviction is conclusive proof of the commission of the criminal offense.

(3) The administrator may file with the board a judgment of conviction showing that an attorney has violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615. The board shall then order the attorney to show cause why a final order of discipline should not be entered, and the board shall refer the proceeding to a hearing panel for hearing. At the hearing, questions as to the validity of the conviction, alleged trial errors, and the availability of appellate remedies shall not be considered. After the hearing, the panel shall issue an order under MCR 9.115(J).

~~(C)~~(4) ~~Pardon; Conviction reversed.~~ On a pardon the board may, and on a reversal of the conviction the board must, by order filed and served under MCR 9.118~~(E)~~ (F),vacate the ~~suspension~~ order of discipline. The attorney's name must be returned to the roster of Michigan attorneys and counselors at law, but the administrator may nevertheless proceed against the respondent for misconduct, which had led to the criminal charge.

(C) Reciprocal Discipline.

(1) A certified copy of a final adjudication by any court of record or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys by any state or territory of the United States or of the District of Columbia, a United States court, or a federal administrative agency, determining that an attorney, whether or not admitted in that jurisdiction, has committed misconduct or has been transferred to disability inactive status, shall establish conclusively the misconduct or the disability for purposes of a proceeding under subchapter 9.120 of these rules and comparable discipline or transfer shall be imposed in the Michigan proceeding unless the respondent was not afforded due process of law in the course of the original proceedings, the imposition of comparable discipline or transfer in Michigan would be clearly inappropriate, or the reason for the original transfer to disability inactive status no longer exists.

(2) Upon the filing by the grievance administrator of a certified copy of final adjudication described in paragraph (C)(1) with the board, the board shall issue an order directed to the lawyer and the administrator:

(a) attaching a copy of the order from the other jurisdiction; and

(b) directing, that, within 21 days from service of the order, the lawyer and administrator shall inform the board (i) of any objection to the imposition of comparable discipline or disability inactive status in Michigan based on the grounds set forth in paragraph (C)(1) of this rule, and (ii) whether a hearing is requested.

(3) Upon receipt of an objection to the imposition of comparable discipline or disability inactive status raising one or more of the issues

identified in paragraph (C)(1) of this rule, the board shall assign the matter to a hearing panel for disposition. The opposing party shall have 21 days to reply to an objection. If a hearing is requested, and the hearing panel grants the request, the hearing shall be held in accordance with the procedures set forth in MCR 9.115 except as otherwise provided in this rule.

(4) Papers filed under this rule shall conform as nearly as practicable to the requirements of subchapter 2.100 and shall be filed with the board and served on the opposing party and each member of the hearing panel once assigned.

(5) The burden is on the party seeking to avoid the imposition of comparable discipline or transfer to disability inactive status to demonstrate that it is not appropriate for one or more of the grounds set forth in paragraph (C)(1). "Comparable" discipline does not mean that the dates of a period of disqualification from practice in this state must coincide with the dates of the period of disqualification, if any, in the original jurisdiction.

(6) If the 21-day period discussed in paragraph (C)(2)(b) has expired without objection by either party, the respondent is in default, with the same effect as a default in a civil action, and the board shall impose comparable discipline or transfer to disability inactive status unless it appears that one of the grounds set forth in paragraph (C)(1) of this rule requires a different result, in which case the board shall schedule a hearing in accord with paragraph (3) of this rule. An order entered pursuant to this subparagraph may be set aside if the requirements of MCR 2.603(D) are established.

(7) In the event the discipline or transfer to disability inactive status imposed in the original jurisdiction is stayed, any reciprocal discipline imposed in Michigan shall be deferred until the stay expires.

Staff comment: In this rule, the AGC recommends technical revisions, as well as insertion of procedures relating to reciprocal discipline, which reflect an expansion and clarification of the procedure currently set out in MCR 9.104(B).

RULE 9.121. ATTORNEY DECLARED TO BE INCOMPETENT OR ALLEGED TO BE INCAPACITATED OR ASSERTING IMPAIRED ABILITY.

(A) Adjudication by Court. If an attorney has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability, the board, on proper proof of the fact, must enter an order effective immediately transferring the attorney to inactive status for an indefinite period and until further order of the board.

(B) Allegations of Incompetency or Incapacity.

(1) If it is alleged in a complaint by the administrator that an attorney is incapacitated to continue the practice of law because of mental or physical infirmity or disability or because of addiction to drugs or intoxicants, a hearing panel shall take action necessary to determine whether the attorney is incapacitated~~, including an examination of the attorney by qualified medical experts the board designates~~.

Alternative A (AGC Proposal)	Alternative B (SBM Proposal)
(a) Independent examination.	(a) Examination.
(i) Upon demand by the administrator or pursuant to an order of a panel, a respondent may be required to submit to one or more medical examination(s) or psychological examination(s) by board-certified or other licensed professionals. Within 30 days of the conclusion of the examination and testing, the medical examiner shall prepare a report which includes:	(i) Upon a showing of good cause that a mental or physical condition is the basis of respondent's incompetency or incapacity as alleged in a complaint by the administrator, a hearing panel may order respondent to submit to one or more medical examination(s) or psychological examination(s) that are relevant to a condition of respondent shown to be in controversy.
(A) the expert's resume or curriculum vitae;	
(B) a statement of facts, and a list of the tests which were administered and the test results;	
(C) a diagnosis, prognosis, a statement of limitations on the opinion because of the scope of the examination or testing, and recommendation for treatment, if any; and	
(D) no physician-patient privilege shall apply under this rule.	
(ii) The independent medical examiner shall provide the report to the panel, the administrator and the respondent. The report shall be admissible into evidence in the proceedings.	(ii) If testing is ordered, the administrator and respondent may stipulate to the expert(s) who will conduct the examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. The content of a report prepared by an expert(s) pursuant to this paragraph is admissible into evidence in the proceedings, subject to relevancy objections.

(iii) The respondent is entitled to be examined by a qualified professional at his or her own expense, but such examiner shall prepare a report in accord with this rule. The respondent shall provide a copy of the report to the administrator within 30 days of the date of its preparation. Failure to provide a timely copy of the report to the grievance administrator shall result in the inability of the respondent to offer the report into evidence at any subsequent formal disciplinary proceeding. The report is otherwise admissible into the record.	(iii) If the administrator and/or respondent hire their own expert(s) to conduct the examination(s), the expert(s) will conduct the examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. A report prepared pursuant to this paragraph is only admissible as substantive evidence upon stipulation by both parties. The respondent will be responsible for the expenses incurred by retaining his or her examiner. (iv) On its own motion or on the motion of either party, the hearing panel may appoint an expert of its own selection to conduct the necessary examination(s). The expert so appointed will conduct the examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. The content of a report prepared by an expert(s) pursuant to this paragraph is admissible into evidence in the proceedings unless, within 14 days of delivery of the report, a party objects, in which case either party may subpoena the expert to testify at the hearing at that party's expense. (b) Expert's Report The expert's report as required by paragraph (a) shall include:

	(i) the expert's resume or curriculum vitae; (ii) a statement of facts, and a list of the tests which were administered and the test results; (iii) a diagnosis, prognosis, a statement of limitations on the opinion because of the scope of the examination or testing, and recommendation for treatment, if any; and (iv) no physician-patient privilege shall apply under this rule.
(2) ~~The hearing panel shall~~ When the administrator files a petition to transfer ~~provide notice to the~~ an attorney ~~of the proceedings and appoint an attorney to represent him or her if he or she is without representation~~ to inactive status, the petition shall be served on respondent according to the provisions of MCR 9.115(C).	(2) The hearing panel shall provide notice to the attorney of the proceedings and appoint an attorney to represent him or her if he or she is without representation.
(3) Upon the request of a party, or on its own motion, and following a finding of good cause, a panel may recommend the appointment of counsel by the board to represent the respondent if he or she is without representation.	(3) If, after a hearing, the hearing panel concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status for an indefinite period and until further order of the board.
(~~3~~4) If, after a hearing, the hearing panel concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status for an indefinite period and until further order of the board.	(4) Pending disciplinary proceedings against the attorney must be held in abeyance.

(~~4~~5) Pending disciplinary proceedings against the attorney shall be administratively closed without prejudice to future prosecution upon the return of the lawyer to active status ~~must be held in abeyance~~. (~~5~~6) Proceedings conducted under this subrule are subject to review by the board as provided in MCR 9.118.	(5) Proceedings conducted under this subrule are subject to review by the board as provided in MCR 9.118.

(C) Assertion of Impaired Ability; Probation.

(1) If, in response to a formal complaint filed under subrule 9.115(B), the respondent asserts in mitigation and thereafter demonstrates by a preponderance of the evidence that

(a) during the period when the conduct which is the subject of the complaint occurred, his or her ability to practice law competently was materially impaired by physical or mental disability or by drug or alcohol addiction,

(b) the impairment was the cause of or substantially contributed to that conduct,

(c) the cause of the impairment is susceptible to treatment, and

(d) he or she in good faith intends to undergo treatment, and submits a detailed plan for such treatment, the hearing panel, the board, or the Supreme Court may enter an order placing the respondent on probation for a specific period not to exceed 3 ~~2~~ years if it specifically finds that an order of probation is not contrary to the public interest.

(2) If the respondent alleges impairment by physical or mental disability or by drug or alcohol addiction pursuant to subrule (C)(1), the hearing panel may order the respondent to submit to a physical or mental examination ~~by a physician selected by the hearing panel or the board, which physician shall report to the hearing panel or board. The parties may obtain a psychiatric or medical evaluation at their own expense by examiners of their own choosing. No physician-patient privilege shall apply under this rule. The respondent's attorney may be present at an examination.~~ in accord with the procedure set forth in MCR 9.121(B)(1)(a). The panel may direct that the expense of the examination be paid by the respondent. A respondent who fails or refuses to comply with an examination order, or refuses to undergo an examination requested by the administrator, shall not be eligible for probation.

(3) The probation order ~~may~~

(a) must specify the treatment the respondent is to undergo,

(b) may require the respondent to practice law only under the direct supervision of other attorneys, or

(c) may include any other terms the evidence shows are likely to eliminate the impairment without subjecting the respondent's clients or the public to a substantial risk of harm because the respondent is permitted to continue to practice law during the probation period.

(4) A respondent may be placed on probation for up to 3 years. The probation order expires on the date specified in it unless the administrator petitions for, and the hearing panel, board, or court grants, an extension. An extension may not exceed ~~2~~ 3 years. A probation order may be dissolved if the respondent demonstrates that the impairment giving rise to the probation order has been removed and that the probation order has been fully complied with, but only one motion to accelerate dissolution of a probation order may be filed during the probation period.

(5) On proof that a respondent has violated a probation order, he or she may be suspended or disbarred.

(D) Publication of Change in Status. The board must publish in the Michigan Bar Journal a notice of transfer to inactive status. A copy of the notice and the order must be filed and served under MCR 9.118.

(E) Reinstatement. An attorney transferred to inactive status under this rule may not resume active status until reinstated by the board's order and, if inactive 3 years or more, recertified by the Board of Law Examiners. The attorney may petition for reinstatement to active status once a year or at shorter intervals as the board may direct. A petition for reinstatement must be granted by ~~the board~~ a panel on a showing by clear and convincing evidence that the attorney's disability has been removed and that he or she is fit to resume the practice of law. ~~The board~~ A panel may take the action necessary to determine whether the attorney's disability has been removed, including an examination of the attorney ~~by qualified medical experts that the board designates~~ conducted in accord with the procedure set forth in MCR 9.121(B)(1)(a). The ~~board~~ panel may direct that the expense of the examination be paid by the attorney. If an attorney was transferred to inactive status under subrule 9.121(A) and subsequently has been judicially declared to be competent, ~~the board~~ a panel may dispense with further evidence that the disability has been removed and may order reinstatement to active status on terms it finds proper and advisable, including recertification.

(F) Waiver of Privilege. By filing a petition for reinstatement to active status under this rule, the attorney waives the doctor-patient privilege with respect to treatment during the period of his or her disability. The attorney shall disclose the name of every psychiatrist, psychologist, physician, and hospital or other institution by whom or in which the attorney has been examined or treated since the transfer to inactive status. The attorney shall furnish to ~~the board~~ a panel written consent for each to divulge whatever information and records are requested by the ~~board's~~ panel's medical or psychological experts.

AGC comment: Paragraph (B) has been expanded to add particulars about a medical examination that can either be demanded by the grievance administrator or ordered by a hearing panel in a proceeding brought by the grievance administrator alleging incapacity of the respondent. The proposed new language details the necessity of obtaining a medical report, the content of the report, and that it becomes part of the

record. A respondent may also obtain such a report and, provided that it is properly served upon the administrator, it is admissible into the record. A new paragraph (B)(2) specifies how the respondent shall be served with the petition by referencing MCR 9.115(C). Changes to paragraph (B)(3) would require a finding of good cause after a request by a party or a hearing panel acting on its own motion in order for a hearing panel to recommend to the attorney discipline board the appointment of a lawyer to represent an unrepresented respondent in a proceeding brought under this rule.

Modifications to paragraph (B)(5) reflect current terminology and procedure.

Changes to paragraph (C)(2) provide that examinations are to be conducted in accordance with the new proposed provisions of paragraph (B)(1)(a). A provision allowing the presence of a respondent's counsel during an examination has been deleted. Paragraph (C)(4) has been changed to expand the initial term of probation from a maximum of two to a period of up to three years. Paragraph (C)(3) has been modified to clarify that the probation order must specify the treatment the respondent is to undergo. The remaining subparagraphs (b) and (c) remain discretionary.

Paragraph (E) has been changed to clarify that reinstatement proceedings pertaining to lawyers transferred to inactive status under this rule are heard by a hearing panel and that examinations sought in a reinstatement proceeding will be handled in accordance with paragraph (B)(1). Consistent with these changes, references to "board" are changed to "panel" in paragraph (F). Also in paragraph (F), a reference to medical experts is modified with the addition of "or psychological" before "experts."

SBM Workgroup comment: All members of the Workgroup other than the AGC representatives concur about the SBM version of paragraph (B)(1) that is proposed. The Workgroup majority believe that good cause ought to have to be shown before the administrator can obtain a hearing panel's order that a respondent submit to one or more medical examinations. Paragraphs (B)(1)(a)(ii), (iii), and (iv) address circumstances where the administrator and respondent concur on the selection of the expert to conduct the examination, where each party selects his or her own, and where the hearing panel selects its own. The Workgroup version retains unaltered the provision appointing an unrepresented respondent (paragraph (B)(1)(b)[2]), the provision holding pending disciplinary proceeding in abeyance (paragraph (B)(1)(b)[4]) and the language providing a 2-year maximum for a period of probation (paragraph (C)[4]), all of which are consistent with current practice.

RULE 9.122. REVIEW BY SUPREME COURT.

(A) Kinds Available; Time for Filing.

(1) A party aggrieved, including the ~~person who made a request for investigation~~ complainant, by a final order ~~of discipline or dismissal~~ entered by the board on review under MCR 9.118, may apply for leave to appeal to the Supreme Court under MCR 7.302 within 28 days after the order is entered. If a motion for reconsideration is filed before the board's

order takes effect, the application for leave to appeal to the Supreme Court may be filed within 28 days after the board enters its order granting or denying reconsideration.

(2) If a request for investigation has been dismissed under MCR 9.112(C)(1) (a) or 9.114(A), a party aggrieved by the dismissal may file a complaint in the Supreme Court under MCR 7.304.

(B) Rules Applicable. Except as modified by this rule, subchapter 7.300 governs an appeal.

(C) Stay of Order. If the discipline order is a suspension of 179 days or less, a stay of the order will automatically issue on the timely filing of an appeal by the respondent. The stay remains effective ~~until~~ for 21 days following the conclusion of the appeal or further order of the Supreme Court. The respondent may petition the Supreme Court for a stay pending appeal of other orders of the board.

(D) Record on Appeal. The original papers constitute the record on appeal. The board shall certify the original record and file it with the Supreme Court promptly after the briefs of the parties have been filed. The record must include a list of docket entries, a transcript of testimony taken, and all pleadings, exhibits, briefs, findings of fact, and orders in the proceeding. If the record contains material protected, the protection continues unless otherwise ordered by the Supreme Court.

(E) Disposition. The Supreme Court may make any order it deems appropriate, including dismissing the appeal. The parties may stipulate to dismiss the appeal with prejudice.

Staff comment: The proposed changes in this rule would make primarily technical updates to the current language.

RULE 9.123. ELIGIBILITY FOR REINSTATEMENT.

(A) Suspension, 179 Days or Less. An attorney whose license has been suspended for 179 days or less is automatically reinstated by filing with the Supreme Court clerk, the board, and the administrator an affidavit showing that the attorney has fully complied with the terms and conditions of the suspension order. A materially false statement contained in the affidavit is ground for disbarment.

(B) ~~Revocation~~ Disbarment or Suspension More Than 179 Days. An attorney whose license to practice law has been revoked or suspended for more than 179 days is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124 and has established by clear and convincing evidence that:

(1) he or she desires in good faith to be restored to the privilege of practicing law in Michigan;

(2) the term of the suspension ordered has elapsed or 5 years have elapsed since his or her ~~revocation of the license~~ disbarment or resignation;

(3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension or ~~revocation~~ disbarment;

(4) he or she has complied fully with the order of discipline;

(5) his or her conduct since the order of discipline has been exemplary and above reproach;

(6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;

(7) taking into account all of the attorney's past conduct, including the nature of the misconduct that led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court;

(8) he or she is in compliance with the requirements of subrule (C), if applicable; and

(9) he or she has reimbursed the client security fund of the State Bar of Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his or her conduct. Failure to fully reimburse as agreed is ground for ~~revocation~~ vacating an order of ~~a~~ reinstatement.

(C) Reinstatement After Three Years. An attorney who, as a result of disciplinary proceedings, resigns, is disbarred, or is suspended for any period of time, and who does not practice law for 3 years or more, whether as the result of the period of discipline or voluntarily, must be recertified by the Board of Law Examiners before the attorney may be reinstated to the practice of law.

(D) Petition for Reinstatement; Filing Limitations.

(1) Except as provided in subrule (D)(3), an attorney whose license to practice law has been suspended may not file a petition for reinstatement earlier than 56 days before the term of suspension ordered has fully elapsed.

(2) An attorney whose license to practice law has been revoked or who has resigned may not file a petition for reinstatement until 5 years have elapsed since ~~revocation of the license~~ the attorney's resignation or disbarment.

(3) An attorney whose license to practice law has been suspended because of conviction of a felony for which a term of incarceration was imposed may not file a petition for reinstatement until six months after completion of the sentence, including any period of parole.

(4) An attorney ~~whose license to practice law has been revoked~~ who has been disbarred or suspended and who has been denied reinstatement may not file a new petition for reinstatement until at least ~~180 days~~ 1 year from the effective date of the most recent hearing panel order granting or denying reinstatement.

Staff comment: The proposed changes are primarily technical updates. However, the AGC recommends that under paragraph (D)(4) the period between filing reinstatement petitions be increased to one year for reasons of administrative economy and to ensure that the applicant for reinstatement has time outside of any supervision in order to provide an appropriate track record for a panel's review. The SBM workgroup would prefer that the time period in (D)(4) remain at 180 days.

RULE 9.124. PROCEDURE FOR REINSTATEMENT.

(A) Filing of Petition. An attorney petitioning for reinstatement shall file the original petition for reinstatement with the Supreme Court clerk and a copy with the board and the commission.

(B) Petitioner's Responsibilities.

(1) Separately from the petition for reinstatement, the petitioner must serve only upon the administrator a personal history affidavit. The affidavit is to become part of the administrator's investigative file and may not be disclosed to the public except under the provisions of MCR 9.126. The ~~following information~~ affidavit must ~~be attached to or~~ contain~~ed in the affidavit~~ the following information:

(a) every residence address since the date of disqualification from the practice of law;

(b) employment history since the time of disqualification, including the nature of employment, the name and address of every employer, the duration of such employment, and the name of the petitioner's immediate supervisor at each place of employment; if requested by the grievance administrator, the petitioner must provide authorization to obtain a copy of the petitioner's personnel file from the employer;

(c) a copy of a current driver's license;

(d) any continuing legal education in which the petitioner participated during the period of disqualification from the practice of law;

(e) bank account statements, from the date of disqualification until the filing of the petition for reinstatement, for each and every bank account in which petitioner is named in any capacity;

(f) copies of the petitioner's personal and business federal, state, and local tax returns from the date of disqualification until the filing of the petition for reinstatement, and if the petitioner owes outstanding income taxes, interest, and penalties, the petitioner must provide a current statement from the taxation authority of the current amount due; if requested by the grievance administrator, the petitioner must provide a waiver granting the grievance administrator authority to obtain information from the tax authority;

(g) any and all professional or occupational licenses obtained or maintained during the period of disqualification and whether any were suspended or revoked;

(h) any and all names used by petitioner since the time of disqualification;

(i) petitioner's place and date of birth;

(j) petitioner's social security number;

(k) whether, since the time of disqualification, petitioner was a party or a witness in any civil case, and the title, docket number, and court in which the ~~such~~ case occurred;

(l) whether the petitioner was a party to any civil case, including the title, docket number, and court in which such case was filed; the petitioner must provide copies of the complaints and any dispositional orders or judgments, including settlement agreements, in such cases;

(m) whether the petitioner was a defendant or a witness in any criminal case, and the title, docket number, and court in which such case

was filed; the petitioner must provide copies of the indictments or complaints and any dispositional orders or judgments of conviction in cases in which the petitioner was a defendant;

(n) whether the petitioner was subject to treatment or counseling for mental or emotional impairments, or for substance abuse or gambling addictions since the time of disqualification; if so, the petitioner must provide a current statement from the petitioner's service provider setting forth an evaluative conclusion regarding the petitioner's impairment(s), the petitioner's treatment records, and prognosis for recovery.

(2) The petitioner must, contemporaneously with the filing of the petition for reinstatement and service on the administrator of the personal history affidavit, remit

(a) to the administrator the fee for publication of a reinstatement notice in the Michigan Bar Journal.

(b) to the board the basic administrative costs required under MCR 9.128(B)(1)

(i) an administrative cost of $750 where the discipline imposed was a suspension of less than 3 years;

(ii) an administrative cost of $1,500 where the discipline imposed was a suspension of 3 years or more or disbarment.

(3) If the petition is facially sufficient and the petitioner has provided proof of service of the personal history affidavit upon the administrator and paid the publication fee required by subrule (B)(2), the board shall assign the petition to a hearing panel. Otherwise, the board may dismiss the petition without prejudice, on its own motion or the motion of the administrator.

(4) A petitioner who files the petition before the term of suspension ordered has fully elapsed must file an updated petition and serve upon the administrator an updated personal history affidavit within 14 days after the term of suspension ordered has fully elapsed. All petitioners remain under a continuing obligation to provide updated information bearing upon the petition or the personal history affidavit.

(5) The petitioner must cooperate fully in the investigation by the administrator into the petitioner's eligibility for reinstatement by promptly providing any information requested. If requested, the petitioner must participate in a recorded interview and answer fully and fairly under oath all questions about eligibility for reinstatement.

(C) Administrator's Responsibilities.

(1) Within 14 days after the commission receives its copy of the petition for reinstatement, the administrator shall submit to the Michigan Bar Journal for publication a notice briefly describing the nature and date of the discipline, the misconduct for which the petitioner was disciplined, and the matters required to be proved for reinstatement.

(2) The administrator shall investigate the petitioner's eligibility for reinstatement before a hearing on it, report the findings in writing to the board and the hearing panel within 56 days of the date the board assigns the petition to the hearing panel, and serve a copy on the petitioner.

(a) For good cause, the hearing panel may allow the administrator to file the report at a later date, but in no event later than 7 days before the hearing.

(b) The report must summarize the facts of all previous misconduct and the available evidence bearing on the petitioner's eligibility for reinstatement. The report is part of the record but does not restrict the parties in the presentation of additional relevant evidence at the hearing. Any evidence omitted from the report or received by the administrator ~~subsequent to~~ after the filing of the report must be disclosed promptly to the hearing panel and ~~the petitioner~~ to the opposing party.

(D) Hearing on Petition. A reinstatement hearing may not be held earlier than 28 days after the administrator files the investigative report with the hearing panel unless the hearing panel has extended the deadline for filing the report. The proceeding on a petition for reinstatement must conform as nearly as practicable to a hearing on a complaint. The petitioner shall appear personally before the hearing panel for cross-examination by the administrator and the hearing panel and answer fully and fairly under oath all questions regarding eligibility for reinstatement. The administrator and the petitioner may call witnesses or introduce evidence bearing upon the petitioner's eligibility for reinstatement. The hearing panel must enter an order granting or denying reinstatement and make a written report signed by the chairperson, including a transcript of the testimony taken, pleadings, exhibits and briefs, and its findings of fact. A reinstatement order may grant reinstatement subject to conditions that are relevant to the established misconduct or otherwise necessary to insure the integrity of the profession, to protect the public, and to serve the interests of justice. The report and order must be filed and served under MCR 9.118(F).

(E) Review. Review is available under the rules governing review of other hearing panel orders. The administrator may request a stay of an order granting eligibility for reinstatement.

Staff comment: The amendments proposed in this rule are primarily technical and clarifying ones. But according to the AGC, the proposed change to paragraph (E), would effect a substantive change to case law. In *Probert v Michigan Attorney Discipline Board*, SC #70448 (December 29, 1982), the Court acted on a mandamus complaint filed by a petitioner seeking reinstatement whose reinstatement had been stayed by the board at the request of the administrator. The Court vacated the board's order, holding that it was without authority to issue a stay. The proposed change would grant such authority.

RULE 9.125. IMMUNITY.

A person is absolutely immune from suit for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or proceeding on alleged misconduct or reinstatement. The administrator, legal counsel, investigators, members of hearing panels, masters, receivers appointed under MCR 9.119(G), voluntary investigators, fee arbitrators, mentors, practice

monitors, the commission, the board, and their staffs are absolutely immune from suit for conduct arising out of the performance of their duties.

A medical or psychological expert who administers testing or provides a report pursuant to MCR 9.114(C) or MCR 9.121 is absolutely immune from suit for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or formal disciplinary proceeding.

Staff comment: As described by the AGC and SBM, "the intention of the changes is to expand the application of the existing immunity rule to regular and periodic nonparty participants in the process who should be afforded immunity for their roles." See jointly-submitted side-by-side chart provided by the AGC and SBM.

RULE 9.126. OPEN HEARINGS; PRIVILEGED, CONFIDENTIAL FILES AND RECORDS.

(A) Investigations. Except as provided in these rules, investigations by the administrator or the staff are privileged from disclosure, confidential, and may not be made public. At the respondent's option, final disposition of a request for investigation not resulting in formal charges may be made public. In addition, any interested person may inspect the request for investigation and the respondent's answer thereto if a ~~formal complaint~~ disciplinary proceeding has been filed.

(B) Hearings. Hearings before a hearing panel and the board must be open to the public, but not their deliberations.

(C) Papers. Formal pleadings, reports, findings, recommendations, discipline, reprimands, transcripts, and orders resulting from hearings must be open to the public. A personal history affidavit filed pursuant to MCR 9.124(B)(1) is a confidential document that is not open to the public. This subrule does not apply to a request for a disclosure authorization submitted to the board or the Supreme Court pursuant to subrules (D) ~~(7)~~(8) or (E) ~~(5)~~(8).

(D) Other Records. Other files and records of the board, the commission, the administrator, legal counsel, hearing panels and their members, and the staff of each may not be examined by or disclosed to anyone except

(1) the commission,

(2) the administrator,

(3) the respondent as provided under MCR 9.115(F)(4),

Alternative A (AGC Proposal)	Alternative B (SBM Proposal)
(4) a respondent's employer as provided under MCR 9.114(b)	[The state bar proposed no changes here and would not publish for comment the AGC's proposed new language in (D)(4).]

(~~4~~5) members of hearing panels or the board,

(~~5~~6) authorized employees,

(67) the Supreme Court, or

(~~7~~8) other persons who are expressly authorized by the board or the Supreme Court.

If a disclosure is made to the Supreme Court, the board, or a hearing panel, the information must also be disclosed to the respondent, except as it relates to an investigation, unless the court otherwise orders.

(E) Other Information. Notwithstanding any prohibition against disclosure set forth in this rule or elsewhere, the commission shall disclose the substance of information concerning attorney or judicial misconduct to the Judicial Tenure Commission, upon request. The commission also may make such disclosure to the Judicial Tenure Commission, absent a request, and to:

(1) the State Bar of Michigan Client Security Fund;

(2) the State Bar of Michigan:

(a) Committee on Judicial Qualifications;

(b) Lawyers and Judges Assistance Program;

(c) District and Standing Committees on Character and Fitness; or,

(d) Unauthorized Practice of Law Committee,

(3) any court-authorized attorney disciplinary or admissions agency, ~~or~~ including any federal district court or federal disciplinary agency considering the licensing of attorneys in its jurisdiction,

(4) the Michigan Appellate Assigned Counsel System,

Alternative A (AGC Proposal)	Alternative B (SBM Proposal)
(5) any Michigan court considering the appointment of a lawyer in a pending matter as house counsel, or as a standing appointment,	[Does not include the AGC's provision in (E)(5).]
(~~5~~6) a lawyer representing the respondent in an unrelated disciplinary investigation or proceeding;	(5) a lawyer representing the respondent in an unrelated disciplinary investigation or proceeding;
(67) law enforcement agencies; or	(6) law enforcement agencies; or
(48) other persons who are expressly authorized by the board or the Supreme Court.	(47) other persons who are expressly authorized by the board or the Supreme Court.

~~(F) Summary of Disclosures. The board shall include in its annual report to the Supreme Court an accounting of all requests for disclosure~~

~~that have been filed with the board pursuant to subrules (D)(7) and (E)(4). The accounting shall include the board's disposition of each request.~~

Staff comment: The proposal would make primarily technical and clarifying changes, and would explicitly expand the list of agencies that would be entitled to information regarding an attorney regarding misconduct. The AGC version includes language that would allow the AGC to disclose AGC files and records to an attorney's employer (under (D)[4]) and would require the AGC to disclose information concerning attorney or judicial misconduct to a court considering appointment of an attorney as house counsel or to a standing appointment (under (E)[5]). The SBM opposes these proposed changes.

RULE 9.127. ENFORCEMENT.

(A) Interim Suspension. The Supreme Court, the board, or a hearing panel may order the interim suspension of a respondent who fails to comply with its lawful order. The suspension shall remain in effect until the respondent complies with the order or no longer has the power to comply. If the respondent is ultimately disciplined, the respondent shall not receive credit against the disciplinary suspension or disbarment for any time of suspension under this rule. All orders of hearing panels under this rule shall be reviewable immediately under MCR 9.118. All orders of the board under this rule shall be appealable immediately under MCR 9.122. The reviewing authority may issue a stay pending review or appeal.

(B) Contempt. The administrator may enforce a discipline order or an order granting or denying reinstatement by proceeding against a respondent for contempt of court. The proceeding must conform to MCR 3.606. The petition must be filed by the administrator in the circuit court in the county in which the alleged contempt took place, or in which the respondent resides, or has or had an office. Enforcement proceedings under this rule do not bar the imposition of additional discipline upon the basis of the same noncompliance with the discipline order. <u>The circuit court shall waive fees and costs in an action brought by the administrator to enforce a disciplinary order.</u>

Staff comment: The proposed change in this rule would require the circuit court to waive fees in an action brought by the grievance administrator on a disciplinary action.

RULE 9.128. COSTS.

(A) Generally. The hearing panel and the board, in an order of discipline or an order granting or denying reinstatement, must include a provision directing the payment of costs within a specified period of time. Under exceptional circumstances, the board may grant a motion to reduce administrative costs assessed under this rule, but may not reduce the assessment for actual expenses. Reimbursement must be a condition in a reinstatement order.

(B) Amount and Nature of Costs Assessed. The costs assessed under these rules shall include both basic administrative costs and disciplinary

expenses actually incurred by the board, the commission, a master, or a panel for the expenses of that investigation, hearing, review and appeal, if any.

(1) Basic Administrative Costs:

(a) for discipline by consent pursuant to MCR 9.115(F)(5), $750;

(b) for all other orders imposing discipline, $1,500;

(c) with the filing of a petition for reinstatement ~~under MCR 9.124(A), where the discipline imposed was a suspension of less than 3 years, $750~~ as set forth in MCR 9.124(B)(2)(b)(i) and (ii);

~~(d) with the filing of a petition for reinstatement under MCR 9.124(A), where the discipline imposed was a suspension of 3 years or more or disbarment, $1,500.~~

(2) Actual Expenses. Within 14 days of the conclusion of a proceeding before a panel or a written request from the board, whichever is later, the grievance administrator shall file with the board an itemized statement of the commission's expenses allocable to the hearing, including expenses incurred during the grievance administrator's investigation. Copies shall be served upon the respondent and the panel. An itemized statement of the expenses of the board, the commission, and the panel, including the expenses of a master, shall be a part of the report in all matters of discipline and reinstatement.

(C) Certification of Nonpayment. If the respondent fails to pay the costs within the time prescribed, the board shall serve a certified notice of the nonpayment upon the respondent. Copies must be served on the administrator and the State Bar of Michigan. Commencing on the date a certified report of nonpayment is filed, interest on the unpaid fees and costs shall accrue thereafter at the rates applicable to civil judgments.

(D) Automatic Suspension for Nonpayment. The respondent will be suspended automatically, effective 7 days from the mailing of the certified notice of nonpayment, and until the respondent pays the costs assessed or the board approves a suitable plan for payment. The board shall file a notice of suspension with the clerk of the Supreme Court and the State Bar of Michigan. A copy must be served on the respondent and the administrator. A respondent who is suspended for nonpayment of costs under this rule is required to comply with the requirements imposed by MCR 9.119 on suspended attorneys.

(E) Reinstatement. A respondent who has been automatically suspended under this rule and later pays the costs or obtains approval of a payment plan, and is otherwise eligible, may seek automatic reinstatement pursuant to MCR 9.123(A) even if the suspension under this rule exceeded 179 days. However, a respondent who is suspended under this rule and, as a result, does not practice law in Michigan for 3 years or more, must be recertified by the Board of Law Examiners before the respondent may be reinstated.

(F) Assessment of Costs. Other than for costs assessed under this rule, sanctions in the form of fines or costs are unavailable in disciplinary proceedings, except that, in granting an adjournment, a panel may require that a party pay costs associated with witnesses.

Staff comment: The proposed amendments in this rule would make primarily technical changes, with the exception of subsection (F).

AGC comment: Under proposed paragraph (F), neither side could be assessed sanctions in the form of fines or costs except as otherwise provided, or to obtain an adjournment. The rule is proposed in an attempt to avoid expensive, time-wasting, overly litigious collateral attacks during disciplinary pleadings.

SBM Workgroup comment: The AGC-proposed new paragraph (F) is intended by the AGC as a way of exempting the grievance administrator and its staff attorneys from being subjected to sanctions. Workgroup members other than the AGC representatives believe such an exemption is inappropriate.

RULE 9.129. EXPENSES; REIMBURSEMENT.

The state bar must reimburse each investigator, legal counsel, hearing panel member, board member, master, and commission member for the actual and necessary expenses the board, commission, or administrator certifies as incurred as a result of these rules.

RULE 9.130. MCR 8.122 CASES; ARBITRATION; DISCIPLINE; FILING COMPLAINT BY ADMINISTRATOR.

~~(A) Proceedings. A proceeding on alleged misconduct to which MCR 8.122 is applicable is the same as for a request for investigation. No investigation may be made on a claim by an attorney against a client.~~

(~~B~~A) Arbitration. On written agreement between an attorney and his or her client, the administrator or an attorney the administrator assigns may arbitrate a dispute and enter an award in accordance with the arbitration laws. Except as otherwise provided by this subrule, the arbitration is governed by MCR 3.602. The award and a motion for entry of an order or judgment must be filed in the court having jurisdiction under MCR 8.122. If the award recommends discipline of the attorney, it must also be treated as a request for investigation.

(~~C~~B) Complaint. If the administrator finds that the filing of a complaint in the appropriate court under MCR 8.122 will be a hardship to the client and that the client may have a meritorious claim, the administrator may ~~shall~~ file the complaint on behalf of the client and prosecute it to completion without cost to the client.

Staff comment: The proposed change in this rule would eliminate unnecessary and confusing language in subsection (A); the proposed amendments would not eliminate the ability of a client to seek compensation from an attorney under MCR 8.122.

RULE 9.131. INVESTIGATION OF MEMBER OR EMPLOYEE OF BOARD OR COMMISSION; INVESTIGATION OF ATTORNEY REPRESENTING RESPONDENT OR WITNESS; REPRESENTATION BY MEMBER OR EMPLOYEE OF BOARD OR COMMISSION.

(A) Investigation of Commission Member or Employee. If the request is for investigation of an attorney who is a member or employee of the commission, the following provisions apply:

(1) The administrator shall serve a copy of the request for investigation on the respondent by ordinary mail. Within 21 days after service, the

respondent shall file with the administrator an answer to the request for investigation conforming to MCR 9.113. The administrator shall send a copy of the answer to the ~~person who filed the request for investigation~~ complainant.

(2) After the answer is filed or the time for answer has expired, the administrator shall send copies of the request for investigation and the answer to the Supreme Court clerk.

(3) The Supreme Court shall review the request for investigation and the answer and shall either dismiss the request for investigation or appoint volunteer legal counsel to investigate the matter.

(4) If, after conducting the investigation, appointed counsel determines that the request for investigation does not warrant the filing of a formal complaint, he or she shall file a report setting out the reasons for that conclusion with the administrator, who shall send a copy of the report to the Supreme Court clerk, the respondent, and the ~~person who filed the request for investigation~~ complainant. Review of a decision not to file a formal complaint is limited to a proceeding under MCR 9.122(A)(2). If appointed counsel determines not to file a complaint, the administrator shall close and maintain the file under MCR 9.114(E). MCR 9.126(A) governs the release of information regarding the investigation.

(5) If, after conducting the investigation, appointed counsel determines that the request for investigation warrants the filing of a formal complaint, he or she shall prepare and file a complaint with the board under MCR 9.115(B).

(6) Further proceedings are as in other cases except that the complaint will be prosecuted by appointed counsel rather than by the administrator.

If the request is for investigation of the administrator, the term "administrator" in this rule means a member of the commission or some other employee of the commission designated by the chairperson.

(B) Investigation of Board Member or Employee. Before the filing of a formal complaint, the procedures regarding a request for investigation of a member or employee of the board are the same as in other cases. Thereafter, the following provisions apply:

(1) The administrator shall file the formal complaint with the board and send a copy to the Supreme Court clerk.

(2) The ~~C~~chief ~~J~~justice shall appoint a hearing panel and may appoint a master to conduct the hearing. The hearing procedure is as provided in MCR 9.115, ~~or~~ 9.117, or 9.120, as is appropriate, except that no matters shall be submitted to the board. Procedural matters ordinarily within the authority of the board shall be decided by the hearing panel, except that a motion to disqualify a member of the panel shall be decided by the ~~C~~chief ~~J~~justice.

(3) The order of the hearing panel is effective 21 days after it is filed and served as required by MCR 9.115(J), and shall be treated as a final order of the board. The administrator shall send a copy of the order to the Supreme Court clerk.

(4) MCR 9.118 does not apply. Review of the hearing panel decision is by the Supreme Court as provided by MCR 9.122.

(C) Investigation of Attorney Representing a Respondent or Witness in Proceedings Before Board or Commission.

(1) Request by a former client. A request for investigation filed by an attorney or witness against his or her counsel for alleged misconduct occurring in a disciplinary investigation or proceeding, shall be treated under the procedures set forth in MCR 9.112.

(2) Request by person other than former client. If a person other than the attorney's former client requests an investigation ~~If the request is for an investigation of an attorney~~ for alleged misconduct committed during the course of that attorney's representation of a respondent or a witness in proceedings before the board or the commission, the procedures in subrule (A) shall be followed. A request for investigation that alleges misconduct of this type may be filed only by the chairperson of the commission, and only if the commission passes a resolution authorizing the filing by the chairperson.

(D) Representation by Commission or Board Member or Employee. A member or employee of the Attorney Grievance Commission or the Attorney Discipline Board and its hearing panels may not represent a respondent in proceedings before the commission, the board, or the Judicial Tenure Commission, including preliminary discussions with employees of the respective commission or board prior to the filing of a request for investigation.

Staff comment: The proposed amendments in this rule would make technical and clarifying changes.

RULE 8.110. CHIEF JUDGE RULE.

(A)-(B) [Unchanged.]

(C) Duties and Powers of Chief Judge.

(1)-(7) [Unchanged.]

(8) Notice to the Attorney Grievance Commission. The chief judge of every judicial and circuit court shall provide to the commission a certified copy of any written opinion or order entered by the court holding a lawyer in contempt or finding that a lawyer has provided incompetent representation or engaged in misconduct that reflects adversely upon the lawyer's fitness to engage in the practice of law.

(D) [Unchanged.]

Staff comment: The proposed change in this rule would require the chief judge of every court to send a certified copy to the AGC of any order or opinion that holds a lawyer in contempt or includes a finding that a lawyer has provided incompetent representation or engaged in misconduct.

RULE 8.120. LAW STUDENTS AND RECENT GRADUATES; PARTICIPATION IN LEGAL AID CLINICS, DEFENDER OFFICES, AND LEGAL TRAINING PROGRAMS.

(A) [Unchanged.]

(B) Legal Training Programs. Law students and recent law graduates may participate in legal training programs organized in the offices of county prosecuting attorneys, county corporation counsel, city attorneys, the Attorney Grievance Commission, and the Attorney General.

(C) [Unchanged.]

(D) Scope; Procedure.

(1)-(3) [Unchanged.]

(4) A law student or graduate serving in a prosecutor's, county corporation counsel's, city attorney's, Attorney Grievance Commission's, or Attorney General's program may be authorized to perform comparable

functions and duties assigned by the prosecuting attorney, county attorney, city attorney, Attorney Grievance Commission attorney, or Attorney General, except that

(a) the law student or graduate is subject to the conditions and restrictions of this rule; and

(b) the law student or graduate may not be appointed as an assistant prosecutor, assistant corporation counsel, assistant city attorney, assistant Attorney Grievance Commission attorney, or assistant Attorney General.

Staff comment: The proposed changes in this rule would allow law students and recent law graduates to work in the AGC's offices as they can now for other public service agencies and offices.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments will be posted on the Court's website. When filing a comment, please refer to ADM File No. 2006-38.

CORRIGAN, J. I oppose the State Bar of Michigan's proposed amendment of MCR 9.104 (Alternative B).[1] Under Alternative B, the State Bar would circumscribe the existing grounds for attorney discipline and impinge on the Judicial Tenure Commission's ability to discipline judges. By contrast, the Attorney Grievance Commission's cogent proposed amendment of MCR 9.104 (Alternative A) not only lacks the flaws of Alternative B, but it also maintains or in certain cases expands the existing grounds for disci-

---

[1] Alternative B provides in pertinent part:

> ~~(A)~~ The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:
>
> ~~(1) conduct prejudicial to the proper administration of justice;~~
>
> ~~(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;~~
>
> ~~(3) conduct that is contrary to justice, ethics, honesty, or good morals;~~
>
> ~~(4)~~ (A) conduct that violates the standards or rules of professional ~~responsibility~~ conduct adopted by the Supreme Court;
>
> ~~(5) conduct that violates a criminal law of a state or of the United States;~~
>
> ~~(6)~~(B) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;
>
> ~~(7)~~(C) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);

pline.[2] Consequently, I support publishing Alternative A for public comment, but I oppose publishing Alternative B at this juncture.

One disconcerting aspect of Alternative B is that it would amend MCR 9.104 to constrict the existing grounds for attorney discipline. The State Bar

---

~~(8)~~(D) contempt of the board or a hearing panel; or

~~(9)~~(E) violation of an order of discipline.

[2] Alternative A provides in pertinent part:

(A) The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

(1) conduct prejudicial to the proper administration of justice;

(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;

(3) conduct that is contrary to justice, ethics, honesty, or good morals;

(4) conduct that violates the standards or rules of professional conduct ~~responsibility~~ adopted by the Supreme Court;

(5) conduct that violates a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615;

(6) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;

(7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);

(8) contempt of the board or a hearing panel; ~~or~~

(9) violation of an order of discipline; or

(10) entering into an agreement or attempting to obtain an agreement, that:

(a) the professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the administrator;

(b) the plaintiff shall withdraw a request for investigation or shall not cooperate with the investigation or prosecution of misconduct by the administrator; or

(c) the record of any civil action for professional misconduct shall be sealed from review by the administrator.

asserts that Alternative B better aligns the grounds for discipline in MCR 9.104 with MRPC 8.4 and that it encourages attorneys to rely on the rules of professional conduct for information about misconduct. However, the State Bar fails to explain why its sizeable changes are necessary or advisable when it is undisputed that the standards set forth in subchapter 9.100 *et seq*., "include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court." MCR 9.103(A). The State Bar also offers no persuasive justification for deleting four grounds for discipline from the current rule. See MCR 9.104(A)(1)-(3), (5). Additionally, the State Bar tends to ignore the practical effect of Alternative B—that is, Alternative B narrows significantly rather than maintains the existing grounds for discipline. For example, one ground for discipline under the current rule is "conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach." MCR 9.104(A)(2). The State Bar proposes deleting this ground for discipline although MRPC 8.4 has no parallel provision. I would not circumscribe the existing grounds for attorney discipline. Insofar as the State Bar supports such efforts, I think that its proposal offends the underlying purpose of disciplinary proceedings, which this Court enacted not "as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession." MCR 9.105.

Another problematic aspect of Alternative B is the State Bar's apparent failure to consider how its proposal could hinder the Judicial Tenure Commission's ability to discipline judges for lapses in professional conduct identified in the current rule. To the extent that the Judicial Tenure Commission relies on MCR 9.104 as a basis for establishing the grounds for judicial discipline, any proposed amendment of MCR 9.104 will affect the rules governing that body. Therefore, the State Bar's proposal to delete four grounds for discipline from the current rule likely could impinge on the Judicial Tenure Commission's ability to discipline judges under subchapter 9.200 *et seq*. Nonetheless, the State Bar views any effects of Alternative B on the Judicial Tenure Commission as outside the scope of its inquiry. I question whether the State Bar's willful disinterest in considering the practical effects of Alternative B on the Judicial Tenure Commission embodies a serious effort to draft the proposed amendment of MCR 9.104 that best protects "the public, the courts, and the legal profession" in accordance with MCR 9.105. At a minimum, I would instruct the State Bar to carefully deliberate about the potential impact of its proposal on the Judicial Tenure Commission and address any drafting deficiencies before publishing Alternative B for public comment.

Accordingly, I oppose the inclusion of Alternative B in the Court's order regarding the proposed amendment of MCR 9.104. I would publish Alternative A only.

(B) It is also misconduct and a ground for discipline if, through multiple acts and omissions, a lawyer demonstrates the absence of fitness to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. MCR 9.103(A). This is misconduct for which discipline can be imposed for the protection of the public, the courts, and the legal profession. MCR 9.105. In proceedings brought under this subrule, prior acts and omissions of the lawyer are admissible.

To: Michigan Supreme Court
From: Robert Agacinski, Janet Welch
Re: Proposed Revisions to Chapter 9 of the Michigan Court Rules
Date: April 7, 2010

This summary of the key differences between the recommendations for changes to the attorney discipline rules submitted by the Attorney Grievance Commission (AGC) and those submitted by the State Bar is offered jointly by the AGC and the Bar to assist the Court in its deliberations.

Background:

In the fall of 2006, pursuant to the direction of the AGC, the Grievance Administrator submitted comprehensive revisions of Chapter 9 of the Michigan Court rules, the attorney disciplinary procedural rules, to the Michigan Supreme Court for its consideration. At its April 9, 2009, administrative conference, the Court requested the State Bar of Michigan (SBM) to provide input on the proposed rules to the Court within 120 days. A Bar president-appointed workgroup submitted its proposal to the Board of Commissioners, which was adopted on July 24, 2009. The SBM proposal was submitted to the Court on August 6, 2009. With the knowledge of its Commission, AGC staff submitted a revised proposal which maintained certain, proposed rules disapproved by the SBM's workgroup, added new provisions, and corrected language. Since the submission of the two versions, there have been additional minor technical corrections to the AGC version, mostly made following discussion by the Court.

This summary addresses only five key issues upon which there is major disagreement : Grounds for discipline (9.104(A)); Administrator's ability to obtain medical records (MCR 9.112(E) of AGC draft); Discovery (MCR 9.115); Procedure for obtaining medical or psychological examination (MCR 9.121); Exemption of AGC staff from sanctions (MCR 9.128(F)). Each area of disagreement is explained below.

At several administrative conferences beginning in December of 2009, members of the Court have expressed a desire for a more complete side-by-side juxtaposition of the AGC and SBM versions of the full set of rules, with commentary. A separate document addressing that request will be submitted.

I. **MCR 9.104(A) GROUNDS FOR DISCIPLINE**

There are three general areas of disagreement within this category: whether Chapter 9 of the Court Rules should address the general grounds for misconduct, separate and apart from the grounds described in the Michigan Rules of Professional Misconduct (MRPC); how the provision concerning criminal conduct should be stated; and whether the existence of past conduct should form an independent basis for discipline. Both the MRPC and the Michigan Court Rules articulate grounds for discipline. The SBM's focus was in addressing redundancy and inconsistency between language pertaining to grounds for misconduct found in the MRPC and the Michigan Court Rules. The AGC prefers to maintain the status quo, for reasons set forth below.

A. **Placement and Preferred Language**

1. The AGC's Position as to Grounds for Discipline

The AGC recommends that MCR 9.104 be maintained and expanded. Removing all grounds of misconduct has facial attraction, but it is not practical nor desirable. Chapter 9 of the Court Rules contains other grounds which subject lawyers to discipline, such as MCR 9.113(A) (answers to a Request for Investigation) and MCR 9.120 (convictions). Respondent attorneys have also been charged with violating other court rules, such as MCR 5.313(compensation of an attorney in a probate case), or the abuse of the discovery process.

The workgroup did not consider that MCR 9.104 covers not only lawyers, it applies to judges. Removing MCR 9.104 (A)(1), (2), (3), and (5), would harm the ability of the Judicial Tenure Commission (JTC) to take disciplinary action against judges. MCR 9.104 is the court rule relied upon by the JTC in its prosecution of judges. Any changes to MCR 9.104 will necessarily impact the JTC.

The harm caused by the deletion of MCR 9.104(A)(1)-(3) and (5) is not cured by adding the suggested language in footnote 4 that a lawyer shall not "engage in any other conduct that adversely reflects on the lawyer's fitness to practice law." The suggested language is as general as the currently challenged language but without a history of case law and interpretation. It also would required an added element of proof on the part of the prosecution – i.e., that the conduct actually affected the lawyer's practice of law. Except in the very rare case, the AGC would not have evidence to meet this added element.

Removal of the subject provisions would also harm the ability of the AGC to take disciplinary action in cases with unusual fact situations. Relying only on the language of the MRPC could result in an inability to bring charges for conduct such as engaging in sexual relations with one's own client, noting that the MRPC does not have an explicit ban against such activity although such a ban is included in the ABA's Model Rules. Additionally, in *Grievance Adm'r v Fried*, 456 Mich 234, 570 N.W.2d 262 (1997) the Court applied the language of MCR 9.104(A)(1)-(3) to conduct involving judge-shopping:

> The alleged conduct falls squarely within these provisions. It is prejudicial to the administration of justice, because it is an undue interference with the proper assignment of cases under MCR 8.111...
>
> The alleged conduct surely exposes the legal profession and the courts to contempt and ridicule----no reasonable person would

> approve a system in which one can obtain a more lenient judge (and, presumably, a more lenient sentence) in a criminal case by paying $1,000 to a judge's relative.
>
> The alleged conduct is contrary to justice, ethics, honesty, and good morals. It is wrong. Thus the ADB majority properly concluded that "[m]any or perhaps most of the finest members of the bar would probably have nothing to do with the relatively blatant conduct alleged in the complaint.
>
> The question before us today is simply whether the Grievance Administrator has stated a claim on which relief can be granted. He has.

Grievance Adm'r v Fried, 456 Mich at 244-245; 570 NW2d at 267.

> In the AGC's proposed changes to MCR 9.104(A)(4), the wording has been changed to be in accord with the terminology of the Michigan Rules of Professional Conduct. The AGC's proposed change to MCR 9.104(5) reflects that misdemeanor convictions may enter based upon violations of local ordinance, including convictions where the defendant has abused substances such as drunk driving, disorderly conduct, and possession. Additionally, the change to the proposed rule would take cognizance of convictions entered in formalized tribal courts. MCR 9.104(A)(10) prohibits lawyers from entering, or seeking to enter into, settlement agreements with provisions which would conceal attorney misconduct. The Commission recommends the inclusion of a new rule under MCR 9.104(B), allowing prior discipline to be charged in the formal complaint. The inclusion of a Respondent's prior disciplinary record is to show a pattern of misconduct and the fitness of a recidivist respondent, so that the public, the courts, and the legal profession may be protected.
>
> 2. The SBM Position as to Grounds for Discipline
>
> The SBM favors elimination of any redundancy and clarifying any discrepancies between MCR 9.104 and the MRPC and otherwise restricting 9.104(A)[1]

---

[1] **Rule 9.104 Grounds for Discipline in General; Adjudication Elsewhere**

(A) The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:
(1) conduct prejudicial to the proper administration of justice;
(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;
(3) conduct that is contrary to justice, ethics, honesty, or good morals;
(4) conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court;
(5) conduct that violates a criminal law of a state or of the United States;
(6) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;

disciplinary grounds to those pertinent to the disciplinary process itself, relying on grounds set forth in the MRPC as the general basis for disciplinary action. Because the MRPC was not the subject of the workgroup's review, the workgroup made recommendations only as to the language of 9.104. The SBM's version of 9.104[2] deletes current paragraphs (A)(1), (2), (3), and (5)[3], as well as the AGC-proposed habitual offender rule.[4] The eliminated provisions are either explicitly or implicitly covered by existing provisions of MRPC 8.4 or are overly-broad and vague. It is cleaner and more user-friendly to have the grounds for discipline stated clearly in one place rather than to have duplicative or non-identical language in two separate places within the court rules. Additionally, 9.104's provisions concerning "conduct that exposes the legal profession of the courts to

(7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);
(8) contempt of the board or a hearing panel; or
(9) violation of an order of discipline.

(B) Proof of an adjudication of misconduct in a disciplinary proceeding by another state or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate.

[2] The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

(1) ~~*conduct prejudicial to the proper administration of justice;*~~
(2) ~~*conduct that exposes the legal profession of the courts to obloquy, contempt, censure, or reproach;*~~
(3) ~~*conduct that is contrary to justice, ethics, honesty, or good morals;*~~
(4) conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court;
(5) ~~*conduct that violates a criminal law of a state or of the United States;*~~
(6) knowing representation of any facts or circumstances surrounding request for investigation or complaint;
(7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);
(8) contempt of the board or a hearing panel; or
(9) violation of an order of discipline.

[3] Under MCR 9.104(A)(5), conduct that "**violates any criminal law of a state or of the United States**" is a ground for misconduct. Removal of MCR 9.104(A)(5) is not cured by reliance by MRPC 8.4(b) prohibiting a lawyer from engaging in "**conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.**" The restrictive language of MRPC 8.4(b) would affect disciplinary prosecutions under MCR 9.120, such as in *Grievance Adm'r v Deutch and Howell*, 455 Mich 149; 565 NW2d 369 (1997). In *Deutch*, this Court interpreted the applicability of MCR 9.104(A)(5) and MCR 9.120(B)(2), to convictions for drunk-driving related offenses. In the opinion authored by Justice Weaver, the Court overturned the Board's policy of dismissing all first-time drunk-driving offenses holding that "the filing of a judgment of conviction, is an evidentiary tool that allows the prosecutorial branch, the administrator, to expeditiously dispose of a case already adjudicated in the courts. While the judgment is not conclusive proof that discipline must be imposed, it does establish a finding of misconduct under MCR 9.104(5) and that a second-phase discipline hearing is warranted under MCR 9.115(J)(2) and (3)," id. At 455 Mich 160; 565 NW2d at 375.

[4] The ADB representatives suggest that, if the Court adopts the workgroup's version of 9.104, a new paragraph (I) should be added to MRPC 8.4, which would read, "engage in any other conduct that adversely reflects on the lawyer's fitness to practice law."

obloquy, contempt, censure, or reproach" and "conduct that is contrary to justice, ethics, honesty, or good morals" are vaguer and less defined than the language of the MRPC, which gives more precise guidance to the practitioner and the disciplinary system. Criminal conduct is already addressed by MRPC 8.4(b) and MCR 9.120. The potential impact of changes to MCR 9.104 on the disciplinary system for judges was beyond the scope of inquiry for the SBM workgroup. Clearly, the Judicial Tenure Commission has an independent ability to seek changes to its rules with the Supreme Court.

B. MCR 9.104(A)(5) Grounds for Discipline -- Criminal Conduct

MRPC 8.4(b) makes criminal violations the basis for disciplinary action **"where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer**." Under MCR 9.104(A)(5), conduct that "**violates any criminal law of a state or of the United States**" is a ground for misconduct. The State Bar's proposed changes to MCR 9.104(A) would eliminate 9.104(A)(5).

1. Summary of AGC Position:

The AGC opposes the elimination of MCR 9.104(A)(5). The qualifier of MRPC 8.4(b) requires a showing that the criminal misconduct adversely affect the lawyer's honesty, trustworthiness, *or fitness as a lawyer*. This would tie criminal conduct to the lawyer's actions as a professional, an approach which this Court rejected in *Matter of Grimes*, 414 Mich 483, 495; 326 NW2d 380, 384 (1982), when it held that a lawyer is a professional, twenty-four hours a day. Again, the SBM's proposal would add an element of proof to be established by the AGC, that is, that the attorney's condition actually affected his practice. This added element may result in the need for expert testimony, with attendant costs, or may simply go unmet and the case dismissed.

The AGC believes that the proposed change would substantively affect case law establishing that MCR 9.104(A)(5) can serve as the sole basis for the prosecution for any criminal conviction. See *Grievance Adm'r v Deutch and Howell*, 455 Mich 149 (1997). In *Deutch*, the Court provided a safety-valve where a panel could return a finding of misconduct but impose no discipline. The AGC also cites *State Bar Grievance Administrator v Gillis*, 402 Mich 286 (1978); reh. denied, 402 Mich 965 (1978), where the Court held:

> Rule 16.18 [current MCR 9.120] supports the suspension of an attorney because of his conviction of willful failure to file an income tax return. The rule has an important expediting function in relieving the Administrator of the burden of establishing actionable misconduct under Rule 15, para. 2(5), against an attorney convicted of a serious crime. The use of the rule does not

> require independent proof of misconduct; the facts of conviction alone established the Administrator's case.

Removal of MCR 9.104(A)(5) is not cured by reliance by MRPC 8.4(b) prohibiting a lawyer from engaging in "**conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer**." The restrictive language of MRPC 8.4(b) would affect disciplinary prosecutions under MCR 9.120, such as in *Grievance Adm'r v Deutch and Howell*, 455 Mich 149; 565 NW2d 369 (1997). In *Deutch*, this Court interpreted the applicability of MCR 9.104(A)(5) and MCR 9.120(B)(2), to convictions for drunk-driving related offenses. In the opinion authored by Justice Weaver, the Court overturned the Board's policy of dismissing all first-time drunk-driving offenses holding that "the filing of a judgment of conviction, is an evidentiary tool that allows the prosecutorial branch, the administrator, to expeditiously dispose of a case already adjudicated in the courts. While the judgment is not conclusive proof that discipline must be imposed, it does establish a finding of misconduct under MCR 9.104(5) and that a second-phase discipline hearing is warranted under MCR 9.115(J)(2) and (3)," *id.* at 455 Mich 160; 565 NW2d at 375.

2. Summary of SBM Position:

Elimination of MCR 9.104(A)(5) would not hamper discipline action because the grievance administrator has other provisions to rely upon in cases involving criminal violations. The MRPC qualifier is not prohibitively restrictive. Specifically, MRPC 8.4(b) does not contain language limiting the scope of criminal conduct addressed by the rule to criminal conduct that occurs in the course and scope of providing legal services. Rather, it allows the discipline system to address all criminal conduct that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. The concept of "fitness" could include issues raised by drug or alcohol offenses, to the extent that they are indicative of impairment generally. All felony convictions would continue to be captured by MCR 9.120.

C. MCR 9.104 Grounds for Discipline: Proposed "Habitual Offender Rule"

The AGC proposes adding a new ground[5] for disciplinary action based on past conduct. The proposed rule would allow prior discipline to be charged in the formal complaint for the purpose of showing a pattern of misconduct:

> "It is also misconduct and a ground for discipline if, through multiple acts and omissions, a lawyer demonstrates the absence of fitness to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counsel and

[5] (The proposed rule would be MCR 9.104(B), while the current MCR 9.104(B) [reciprocal discipline] would be moved).

> as an officer of the court. MCR 9.103(A). This is misconduct for which discipline can be imposed for the protection of the public, the courts, and the legal profession. MCR 9.105. In proceedings brought under this subrule, prior acts and omissions of the lawyer are admissible."

1. Summary of AGC Position:

The AGC recommends allowing prior discipline to be charged in the formal complaint to establish a pattern of misconduct and going to the overall issue of the fitness of a recidivist respondent. Pursuant to MCR 9.103(A) "the license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court." It can fairly be said that a disciplinary proceeding is to ensure the continued fitness of a subject lawyer. In Schware v Bd of Bar Examiners of New Mexico, 353 US 232, 77 S Ct 752, 761, 1 L Ed 2d 796 (1957), the Court reversed on due process grounds the denial of an applicant's admission to the bar of the state on the basis of past membership in the Communist party. Mr. Justice Frankfurter opined:

> It is a fair characterization of the lawyer's responsibility in our society that he stands as a shield...in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as moral character.

The SBM states that the proposed habitual offender rule would conflict with MRE 404(b), but that is inaccurate. MRE 404(b) is an evidentiary tool with rigid guidelines as to the use of prior *similar* instances. While a recidivist respondent usually follows a pattern of ethical misconduct, it is not unheard of for a particular respondent to have engaged in conduct ranging across the pantheon of ethical violations.

2. Summary of SBM Position:

The proposed rule is overly broad, vague, is not limited to "prior discipline," and would have the effect of e undermining due process protections of the disciplinary procedural rules.

MCR 9.115(J) already mandates the inclusion of information about a respondent lawyer's "previous misconduct" in a hearing panel's report, which places prior misconduct squarely before the decision-maker at a hearing on discipline. The proposed rule would permit the introduction of prior conduct – not even prior

*mis*conduct – before the fact finder has received any evidence pertaining to the currently alleged acts or omissions. Such a change would be unduly prejudicial to the respondent's due process rights, for example, allowing the grievance administrator to reintroduce evidence from prior disciplinary actions in which the lawyer had prevailed, using that previously unpersuasive evidence as the basis for moving an action forward. The proposed rule places no limits on the types or nature of past conduct that could serve as the basis for discipline, and thus is broader than the primary grounds established by court rule. The AGC proposal would conflict with MRE 404(b) and represents a sharp departure from well-settled case law in Michigan that misconduct must be proven prior to the introduction of prior misconduct. In the case of *In re Daggs*, 411 Mich 304; 307 NW2d 66 (1981), the Court held, "only after a decision on the merits of the alleged misconduct is evidence of prior misconduct relevant for the formulation of an order of discipline." Moreover, neither the proposed rule nor the AGC's commentary identifies a problem that this rule is designed to correct.

II. MCR 9.112: Ability to Obtain Medical Records

The AGC proposes a new rule[6] the application of which would be triggered by the existence of a genuine issue as to a material fact about a respondent's

---

[6]**Proposed Rule**:

MCR 9.112(E) Access to Medical and Psychological Records

(1) After the request for investigation has been served on the respondent, and where there is a genuine issue as to a material fact concerning the physical, mental, or emotional condition of the respondent, the administrator may demand the respondent waive applicable privileges and to permit the administrator access to existing records concerning the physical, mental, or emotional condition of the respondent. The release of information will take place in accordance with MCR 2.314(D).

(2) Upon the conviction of an attorney, and upon the grievance administrator's request, the court shall release to the grievance administrator a copy of any substance abuse assessments or psychological reports received by the probation department during the criminal action.

(3) After the request for investigation has been served on the respondent, and where it appears that the respondent is not fit to engage in the practice of law, the administrator may request the respondent to submit to one or more independent examinations by licensed professionals of the administrator's choosing, at the administrator's expense. Where the respondent complies with such a request, the respondent may also be further examined by one or more licensed professionals of the respondent's choosing, at the respondent's expense.

(4) When an examination is conducted pursuant to MCR 9.112(E)(2), the licensed professional must provide the administrator and the respondent with copies of the professional's report with 28 days. The report will include a copy of the professional's resume, an account of the history obtained from the respondent, a description of administered tests and their results, a diagnosis, a prognosis, and recommendations regarding treatment.

(5) All records and reports gathered under MCR 9.112(E) are admissible for one year in disciplinary proceedings against the respondent and after their admission into the record, shall be retained *in camera*.

(6) When a respondent refuses to comply with a demand by the administrator under MCR 9.112(E)(1) or (2), in a case in which the administrator has initiated formal proceedings, the hearing panel shall review the evidence and all

physical, mental, or emotional condition. In such cases, the grievance administrator could ask the respondent to waive any privileges necessary to facilitate access to medical and psychological records. If the lawyer refused to provide a waiver, the new rule would direct the hearing panel in a formal hearing to consider all inferences concerning a lawyer's physical, mental or emotional state in the light most favorable to the administrator. The AGC promotes the rule as useful in those cases in which there is reason to believe that a respondent's professional competence has been affected by substance abuse or mental disability. The SBM believes that the AGC is able to obtain the same or similar information in appropriate circumstances through other rules in the disciplinary process.[7]

A. Summary of AGC Position:

The amendment would allow the grievance administrator to obtain information on underlying causes of alleged misconduct and whether the lawyer is currently fit to represent the public. The goal of the proposed rule is to obtain information to

---

legitimate inferences regarding the relevant physical, mental, or emotional condition of the respondent in the light most favorable to the administrator.

[7] **MCR 9.112(D)(1)** After the request for investigation has been served on the respondent, the commission may issue subpoenas to require the appearance of a witness or the production of documents or other tangible things concerning matters then under investigation. Documents or other tangible things so produced may be subjected to nondestructive testing. Subpoenas shall be returnable before the administrator or a person designated by the administrator.

MCR 9.121(B)

(1) If it is alleged in a complaint by the administrator that an attorney is incapacitated to continue the practice of law because of mental or physical infirmity or disability or because of addiction to drugs or intoxicants, a hearing panel shall take action necessary to determine whether the attorney is incapacitated, including an examination of the attorney by qualified medical experts the board designates.
(2) The hearing panel shall provide notice to the attorney of the proceedings and appoint an attorney to represent him or her if he or she is without representation.
(3) If, after a hearing, the hearing panel concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status for an indefinite period and until further order of the board.
(4) Pending disciplinary proceedings against the money must be held in abeyance.
(5) Proceedings conducted under this subrule are subject to review by the board as provided in MCR 9.118.

MCR 9.121(C)(2) If the respondent alleges impairment by physical or mental disability or by drug or alcohol addiction pursuant to subrule (C)(1), the hearing panel may order the respondent to submit to a physical or mental examination by a physician selected by the hearing panel or the board, which physician shall report to the hearing panel or board. The parties may obtain a psychiatric or medical evaluation at their own expense by examiners of their own choosing. No physician-patient privilege shall apply under this rule. The respondent's attorney may be present at an examination. A Respondent who fails or refuses to comply with an examination order, or refuses to undergo an examination requested by the administrator, shall not be eligible for probation.

help the AGC's oversight body (the Commission) assess a file brought before it with a recommendation by the administrator and his staff. Information obtained during the AGC's investigative stage is *confidential*. Obtaining this information during the investigative stage helps to form appropriate responses to a respondent's personal needs and problems if the alleged misconduct would not result in a lengthy suspension or disbarment. Quite often, this type of information is used to avoid a public disciplinary proceeding by fashioning confidential dispositions to ensure that an attorney receives treatment, etc. Thus, the public is protected and the attorney's reputation is not harmed.

The current rule structure does not provide the administrator with specific authority to obtain the information during the investigative stage. Under MCR 9.112(D)(1), subpoenas may issue to require the appearance of a witness or the production of documents. It does not contain specific authority to issue subpoenas to obtain medical or psychological records. Traditionally, this rule has not been used to obtain such medical, psychological, or substance-related information.

The other rules cited by the SBM take effect only *after* a public disciplinary proceeding has commenced. Further, under MCR 9.121(B), the AGC must first make a showing to a panel that an attorney is incapacitated, which without necessary records is, at best, a surmise and guess. It is only after a showing has been made, that the *panel* seeks out the information. There is no "mandate" requiring the panel to order the evaluation. The panel may deny the request. The incapacity rule is difficult to employ because the AGC usually does not have the medical reports, etc., needed to support such a petition. The other rule cited by the SBM, MCR 9.121(C), only comes into play when a *respondent* raises the issue and requests placement on probation. Although the rule states that a respondent must raise the request in the answer to a formal complaint, the board has held that this is not a requirement. *Grievance Adm'r v Harvey J. Zamek*, 98-114GA; 93-133-FA (ADB 1999). It is not unheard of for a respondent to make the request at the hearing on discipline.

The SBM challenges the rule as vague, suggesting that the language "fit to engage in the practice of law" is undefined. It is noted, however, that similar language was suggested by ADB representatives as the suggested replacement for the changes to MCR 9.104, as recommended by the SBM. As for timeliness of a request for such records, "current" fitness is the issue in disciplinary proceedings. See generally, *In the Matter of the Reinstatement Petition of William Leo Cahalan, Jr.*, No. 04-129-RP (ADB 2006).

B. Summary of SBM Position:

The SBM believes that there are sufficient rules which allow the administrator to obtain medical information in appropriate situations. The workgroup was not persuaded of the need for this rule, concluding that the existing rules adequately address the issue. The grievance administrator can secure subpoenas from the Commission requiring the production of documents "concerning matters then under investigation" [9.112(D)(1)]. If the subject matter of the investigation is an impairment issue, there is no articulated reason why existing records could not be sought through that existing mechanism. Where the grievance administrator alleges attorney incapacity, a hearing panel is mandated to take action necessary to determine that issue, including an examination by a qualified medical expert [9.121(B)]. Where the respondent defends by arguing impairment, the hearing panel may order the respondent to submit to an examination [9.121(C)(2)].

The State Bar also finds the language of the proposed rule to be overbroad and vague. Specifically, it has no time limitation or relevancy provision limiting what "existing records" could be obtained; it could apparently be triggered at any time after a request for investigation has been served, even before the grievance administrator had reached a conclusion about whether misconduct has occurred; and it does not specify what could trigger a "genuine issue as to a material fact" short of the filing of a pleading and a responsive pleading that factually conflict with each other. The very usage of the phrase "genuine issue as to material fact", which emanates from summary judgment parlance, is inapposite as a standard for triggering an ability to mandate the waiver of applicable privileges to facilitate access to records, failing which there are irrebutable presumption consequences . There is no built-in mechanism for contesting the demand for a waiver of privileges, but a failure to comply would trigger all "legitimate" inferences regarding the physical, mental, or emotional condition of the respondent in the light most favorable to the grievance administrator.

The grievance administrator would be empowered to request the respondent to submit to one or more independent examinations where it "appears" that the respondent "is not fit to engage in the practice of law". Because "fit to engage in the practice of law" is not defined in this context, it is not clear that the ability to seek an examination is limited to instances where the grievance administrator believes that the fitness issue relates to a physical, mental, or emotional condition of the respondent. Another paragraph provides that, upon the conviction of an attorney, and with no limitation about the type or level of crime, the grievance administrator could request and a court "shall release" any substance abuse assessments or psychological reports received by the probation department. Because there is no timeframe given relative to the conviction, presumably this could mean that assessments that occurred both prior and subsequent to the conviction could be obtained without regard to whether the crime was a drug or alcohol-related offense and even in the absence of "a genuine issue as to a

material fact" concerning the physical, mental, or emotional condition of the respondent.

III. **MCR 9.115: Discovery**

The State Bar proposes broadening the rule on access to relevant information and evidence. The current language[#] pertaining to discovery during hearing panel procedures provides for a narrower scope of discovery than is provided in civil cases generally in the Michigan Court Rules. The AGC proposal essentially retains the current language of MCR 9.115(F)(4) with some very minor changes.

Under the current discovery rule, upon receipt of a demand made pursuant to this rule, a party must provide to the other party the names and addresses of persons to

[#] MCR 9.115(F)(4) Discovery. Pretrial or discovery proceedings are not permitted, except as follows:

(a) Within 21 days of the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection or copying. Within 14 days after service of a written demand, the documents shall be made available, provided that the administrator need not comply prior to the filing of the respondent's answer; in such case, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Any other documentary evidence to be introduced at the hearing by either party shall be supplied to the other party no later than 14 days prior to the hearing. Any documentary evidence not so supplied shall be excluded from the hearing except for good cause shown.

(b) Within 21 days of the service of a formal complaint, a party may demand in writing that the opposing party supply written notification of the name and address of any person to be called as a witness. Within 14 days after the service of a written demand, the notification shall be supplied. However, the administrator need not comply prior to the filing of the respondent's answer to the formal complaint; in such cases, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer to the formal complaint. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Except for good cause shown, a party who is required to give said notification must give supplemental notice to the adverse party within 7 days after any additional witness has been identified, and must give the supplemental notice immediately if the additional witness is identified less than 14 days before a scheduled hearing.
Upon receipt of a demand made pursuant to this rule, a party must also provide to the other party any statements given by witnesses to be called at the hearing. Witness statements include stenographic, recorded, or written statements of witnesses provided to the administrator, the respondent, or the respondent's representative. The term "written statement" does not include notes or memoranda prepared by a party or a party's representative of conversations with witnesses, or other privileged information.

(c) A deposition may be taken of a witness who lives outside the state or is physically unable to attend the hearing. For good cause shown, the hearing panel may allow the parties to depose other witnesses.

(d) The hearing panel may order a prehearing conference held before a panel member to obtain admissions or otherwise narrow the issues presented by the pleadings. If a party fails to comply with subrule (F)(4)(a) or (b), the hearing panel or the board may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).

be called as a witness, make available for inspection or copying documentary evidence sought to be admitted at the hearing, and provide any statements given by witnesses to be called at the hearing. Witness statements include stenographic, recorded, or written statements of witnesses provided to the administrator, the respondent, or the respondent's representative. The term "written statement" does not include notes or memoranda prepared by a party or a party's representative of conversations with witnesses, or other privileged information. Under the SBM proposal, within 21 days following the filing of an answer, the administrator and respondent would be required to exchange the names and addresses of all persons having knowledge of relevant facts and comply with reasonable requests for (1) non-privileged information and evidence relevant to the changes or the respondent, and (2) other material upon good cause shown to the chair of the hearing panel.

A. Summary of AGC Position:

The AGC opposes the proposed change to MCR 9.115(F)(4)(b)(ii) for several reasons: 1) The proposed rule is poorly written; 2) Disciplinary cases would result in unnecessary discovery battles; 3) Would result in the need for increased AGC attorney staff; and. 4) The confidentiality provisions of MCR 9.126 would be substantially eroded; The SBM's proposed rule is below:

> Within 21 days following the filing of an answer, the administrator and respondent shall exchange the names and addresses of all persons having knowledge of relevant facts and comply with reasonable requests for (1) non-privileged information and evidence relevant to the charges or the respondent, and (2) other material upon good cause shown to the chair of the hearing panel.

The proposed rule is utterly ambiguous and not traditional to Michigan. The SBM rule would impose automatic discovery, which is a hallmark of the federal system, not Michigan's system. Nor, under the principles of statutory construction[9] does it achieve the SBM's stated goals of simply broadening discovery without causing discovery battles.[10] The question arises, then, what

[9]The principles that apply to statutory construction apply equally to interpretation of court rules. *Grievance Administrator v Underwood*, 462 Mich. 188, 193-194, 612 N.W.2d 116 (2000). Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp.*, 471 Mich. 540, 548-549, 685 N.W.2d 275 (2004). The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. *Id.* at 549, 685 N.W.2d 275. In ascertaining legislative intent, this Court gives effect to every word, phrase, and clause in the statute. *Id.* We must consider both the plain meaning of the critical words or phrases, as well as their placement and purpose in the statutory scheme. *Id.* If the wording or language of a statute is unambiguous, the Legislature is deemed to have intended the meaning clearly expressed, and we must enforce the statute as written. *Id.* "'A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.'" *Roberts v Mecosta Co Gen Hosp*, 466 Mich. 57, 63, 642 N.W.2d 663 (2002).

[10]If the proposed rule were interpreted to add a civil discovery requirement, this would likely result in the need for a doubling of AGC staff, both secretarial and legal. The current staff is maxed out in its ability to maintain current

does the proposed rule do? It is so vague that a decent argument may be made either way over whether it creates a wholesale incorporation of the discovery rule because of the phrase "comply with reasonable requests for (1) non-privileged information and evidence relevant to the charges or the respondent". "Requests" would likely take the form of interrogatories or requests to admit, hence, incorporating civil discovery. By any interpretation, however, the proposed rule allows an invasion of AGC files and records in conflict with MCR 9.126, and allows a panel of volunteer lawyers to decide whether a sister agency's files and records to be invaded.

Essentially, the SBM's proposed rule reflects a fundamental lack of understanding of the Michigan disciplinary process. Current case law states that disciplinary proceedings are quasi-criminal.[11] Criminal prosecutors do not engage in civil discovery. There is a tension, however, under MCR 9.115(A), which states that, unless otherwise provide, prosecution of disciplinary actions proceed as would a non-jury civil matter. MCR 9.115(A). Because of that language, discovery is limited to that provided under MCR 9.115. The AGC believes that a better analysis of disciplinary proceedings is that they are *sui generis*[12].

The proposed rule places a *res gestae* requirement on both parties, and is not limited to known *res gestae* witnesses. The phrase "comply with reasonable requests" is vague and overbroad and does not provide a mechanism for resolving disputes over what is "reasonable" or "relevant." Further, it provides an ability to invade the confidential files and records of the Commission upon a showing of "good cause" again, a term which gives vast discretion to a panel as to what constitutes "good cause."

The change would permit respondents to essentially invade AGC files and records, making every part of the Commission's file arguably accessible. Each disciplinary proceeding would have the potential to result in a discovery battle that would then need to be decided by the discipline board to determine whether the confidential files and memoranda of the grievance commission would be disclosed to respondents. Adoption of the proposal rule would result in a substantive change to precedent set by such cases as *Grievance Adm'r v Attorney Discipline Board Tri-County Hearing Panel No. 69*, 447 Mich 1203, 525 NW2d (1994), *Grievance Adm'r v Attorney Discipline Bd.*, 444 Mich 1218, 515 NW2d 360 (1994), *Anonymous v Atty Grievance Comm'n*, 430 Mich 241, 255, 422 NW 2d 648 (1988).

---

case load. Members of the public who file against attorneys are already frustrated by the legal process and forcing them to sit through lengthy depositions would simply add to their frustration.

[11] See generally, *Anonymous v Attorney Grievance Commission*, 430 Mich 217 (1988), *State Bar Grievance Adm'r v Baun*, 395 Mich 28, 232 NW2d 621 (1975); *State Bar Grievance Adm'r v Jackson*, 390 Mich 147, 211 NW2d 38 (1973); and *State Bar of Michigan v Woll*, 387 Mich 154, 194 NW2d 835 (1972).

[12] See proposed change to MCR 9.105 to include language providing that "disciplinary proceedings are *sui generis*."

Further, it would harm the flow of information to the administrator regarding attorney misconduct. Under MCR 9.109(B)(9), the administrator may issue a request for investigation under his own name. Many such requests for investigations are based upon information provided by judges and lawyers who believe that they have a reporting obligation under MRPC 8.3, but who do not want to be a listed complainant. The source of the information is not discoverable by a respondent attorney. The persons providing the information are analogous to a confidential informant. Changes to this rule would make that information discoverable.

B. Summary of SBM Position:

The State Bar endorses a broadening of the current provisions in the belief that a limited broadening of discovery will increase the quality of disciplinary proceedings. During the workgroup meetings, the AGC representatives posited two principal arguments against a broadening of discovery. The first was that it was unnecessary because the present grievance administrator has an "open file" policy. Because that policy is not contained in the rules, however, it could change with a change in administrators. The second argument was that such a change would alter existing case law, which acknowledges that discovery beyond what is currently provided for in the rules cannot be obtained because it is not provided for in the rules – an argument viewed as circular by the other members of the workgroup.

Currently, absent a showing of good cause, the only depositions permitted are of witnesses who live out of state or are physically unable to attend the hearing. [9.115(F)(4)(9)(c)][12]. There is no general ability to seek the identification of persons with knowledge of relevant facts or to employ traditional methods of paper discovery.

The provision addressing the production of witness statements [9.115(F)(4)(b)(ii)] is narrower in scope that MCR 2.302(B)(3)(b) and (c), as it limits witness statements to those provided "to the [grievance] administrator, the respondent, or the respondent's representative" and excludes from the definition of "witness statement" notes or memoranda prepared by a party or a party's representative "of conversations with witnesses, or other privileged information." Such a narrow formulation means that the grievance administrator can frustrate a respondent's attempt to get an advance look at what a witness might say by merely taking notes of a witness interview and assuring that the witness does not write down what he or she remembers or intends to testify about.

Nothing in the proposed language asserts an engrafting of court rules pertaining to all available discovery tools into the disciplinary procedural rules, nor was that the intention of the modest changes being proposed by the SBM. The AGC's

[12] The AGC proposed changes to this rule to include: (3) Upon a showing of good cause by a party, a panel may permit a witness to testify by means of telephone, voice, or video conferencing.

assertion that this modest change would necessarily foment endless discovery battles in every case expresses no confidence in the caliber of lawyers on both sides of the aisle who practice in the area of attorney discipline, a position with which the SBM heartily disagrees.

IV. MCR 9.121 Procedure to Obtain Medical or Psychological Examination

The AGC representatives and the rest of the workgroup differed sharply on how the process should work when the grievance administrator alleges incapacity in a complaint filed under MCR 9.121[14]. The AGC and the SBM agree that the current rule needs substantial revisions. It is the manner of the revision that has caused disagreement with each proposing a different version.[15] The areas of

---

[14] MCR 9.121(B)(1) currently provides:

> If it is alleged in a complaint by the administrator that an attorney is incapacitated to continue the practice of law because of mental or physical infirmity or disability or because of addiction to drugs or intoxicants, a hearing panel shall take action necessary to determine whether the attorney is incapacitated, including an examination of the attorney by qualified medical experts the board designates.

[15] **AGC Version**

(a) Independent examination.

(1) Upon demand by the administrator or pursuant to an order of a panel, a respondent may be required to submit to one or more medical examination or psychological examination(s) by board-certified or other licensed professionals. Within 30 days of the conclusion of the examination and testing, the medical examiner shall prepare a report which includes:

(A) The expert–s resume or curriculum vitae;

(B) A statement of facts, and a list of the tests which were administered and the test results;

(C) A diagnosis, prognosis, a statement of limitations on the opinion because of the scope of the examination or testing, and recommendation for treatment, if any; and

(D) No physician-patient privilege shall apply under this rule.

(2) The independent medical examiner shall provide the report to the panel, the administrator and the respondent. The report shall be admissible into evidence in the proceedings.

(3) The respondent is entitled to be examined by a qualified professional at his or her own expense, but such examiner shall prepare a report in accord with this rule. The respondent shall provide a copy of the report to the administrator within 30 days of the date of its preparation. Failure to provide a timely copy of the report to the grievance administrator shall result in the inability of the respondent to offer the report into evidence at any subsequent formal disciplinary proceeding. The report is otherwise admissible into the record.

(2) ~~The hearing panel shall~~ When the administrator files a petition to transfer ~~*provide notice to the* an~~ attorney ~~*of the proceedings*~~ to inactive status, the petition shall be served on respondent according to the provisions of MCR 9.115(C).

disagreement include: (1) what is required to compel a respondent to submit to an examination and its scope; (2) how the expert is selected; (3) under what circumstances the report generated is admissible; and (4) under what circumstances the hearing panel appoints an attorney to represent the respondent.

---

(3) Upon the request of a party, or on its own motion, and following a finding of good cause, a panel may recommend the appointment of counsel by the board ~~and appoint an attorney~~ to represent the respondent if he or she is without representation.

(4) If, after a hearing, the hearing panel concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status for an indefinite period and until further order of the board.

(5) Pending disciplinary proceedings against the attorney shall be administratively closed without prejudice to future prosecution upon the return of the lawyer to active status ~~must be held in abeyance~~.

(6) Proceedings conducted under this subrule are subject to review by the board as provided in MCR 9.118.

SBM Proposal.

(a) Examination.

(1) Upon a showing of good cause that a mental or physical condition is the basis of respondent's incompetency or incapacity as alleged in a complaint by the administrator, a hearing panel may order respondent to submit to one or more medical examination(s) or psychological examination(s) that are relevant to a condition of respondent shown to be in controversy.

(2) If testing is ordered, the administrator and respondent may stipulate to the expert(s) who will conduct the examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. The content of a report prepared by an expert(s) pursuant to this paragraph is admissible into evidence in the proceedings, subject to relevancy objections.

(3) If the administrator and/or respondent hire their own expert(s) to conduct the examination(s), the experts(s) will conduct the examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. A report prepared pursuant to this paragraph is only admissible as substantive evidence upon stipulation by both parties. The respondent will be responsible for the expenses incurred by retaining his or her examiner.

(4) On its own motion or on the motion of either party, the hearing panel may appoint an expert of its own selection to conduct the necessary examination(s). The expert so appointed will conduct the necessary examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. The content of a report prepared by an expert(s) pursuant to this paragraph is admissible into evidence in the proceedings unless, within 14 days of delivery of the report, a party objects, in which case either party may subpoena the expert to testify at the hearing at that party's expense.

(b) Experts Report.
The expert's report required by paragraph (a) shall include:

(i) The expert's resume or curriculum vitae;
(ii) A statement of facts, and a list of the tests which were administered and the test results;
(iii) A diagnosis, prognosis, a statement of limitations on the option because of the scope of the examination or testing, and recommendation for treatment, if any; and
(iv) No physician-patient privilege shall apply under this rule.

17

A. Summary of AGC Position:

The AGC believes that the current rule needs to be substantially revised to provide mechanisms to establish whether an attorney is incapacitated. There are increasingly matters involving the aging attorney populace, attorneys suffering from advanced substance abuse, and those who may be suffering from psychological or emotional ills. Currently, it is almost impossible to bring an incapacitation proceeding. Investigation is limited in these situations because there is no specific authorization to obtain medical or psychological records in such circumstances. Once an incapacitation proceeding is brought there are few guideposts on how the matter is to proceed. Case law is almost non-existent because few cases are brought due to the poor structure of the rule.

The AGC's version states that upon the administrator's demand, or a panel's order, a respondent may be required to submit to "one or more" medical or psychological examinations. Some attorneys suffer from co-occurring disorders. It is not infrequent to see depression coupled with substance abuse, or a medical condition coupled with an emotional disorder. A report must then be submitted by the expert within 30 days to the board, the administrator, and the respondent. The AGC and the SBM agree on the contents of the report to be submitted by the expert. Under the AGC version, the report is admissible into evidence. Either side would retain the ability to subpoena the expert to testify at the proceeding, as would any party pursuant to MCR 9.115(F)(4). The AGC version entitles a respondent to seek their own expert and have the report admitted, but only if a copy of it is provided to the administrator within 30 days of its preparation. This would prevent a respondent, or respondent's counsel, from waiting until the day of the hearing to provide the information, an event that happens all too frequently.

The SBM's version fails to discuss how the AGC will be able to make a good cause showing if it is unable to demand that a respondent submit to testing, either in response to an incapacity petition or under the new, proposed MCR 9.112 (E).

B. Summary of SBM Position:

The SBM concludes that the AGC proposal does not provide sufficient guidance and protections concerning compelled physical and psychological examinations. The SBM's proposed rule would require a showing of good cause that a mental or physical condition is the basis of the incompetency or incapacity before an examination could be compelled and would limit examinations to those "relevant to a condition of respondent shown to be in controversy." If examinations are to be compelled and admissible in the proceedings, the workgroup version provides that the rule should provide the conditions for selection of the expert. The SBM version provides for three different scenarios: (1) where the administrator and respondent stipulate to the selection of the expert, the report is admissible subject to relevancy objections; (2) where either the administrator or the respondent hire

their own, the report is admissible as substantive evidence only upon stipulation by both parties; (3) where the hearing panel appoints an expert, the report is admissible unless, within 14 days of delivery, a party objects, in which case either party can subpoena the expert to testify at the hearing at that party's expense.

The SBM provision pertaining to the appointment of an attorney to represent an unrepresented respondent is unchanged from the current rule, which makes the appointment mandatory if a respondent is without representation. The AGC would make appointment discretionary, a situation that the rest of the SBM workgroup believe is undesirable.

V. **Limitations on Assessment of Costs**

The AGC recommends adoption of a new rule, 9.127(F), on assessment of costs, that would provide: "Other than for costs assessed under this rule, sanctions in the form of fines or costs are unavailable in disciplinary proceedings, except that, in granting an adjournment, a panel may require that a party pay costs associated with witnesses." The exemption is intended to offer protection not addressed by the civil immunity rule.

A. Summary of AGC Position:

The AGC believes that in the absence of such a provision it is possible that disciplinary proceedings could be burdened by the delay and expense of pernicious collateral attacks. The SBM believes that such a rule should not be put in place because of the possibility of a rogue AGC employee. There has never been an AGC employee actually sanctioned for their conduct in a disciplinary action, however, there have been numerous requests for sanctions brought for tactical reasons by the respondents' bar. Despite the fact that formal complaints must be authorized by the Commission before they are filed, and that staff counsel have little discretion, the respondents' bar has repeatedly sought sanctions against individual staff counsel for prosecuting a formal complaint. This occurs despite the administrator actually signing the complaint. This tactical request distracts from the purpose of the proceeding and is brought simply to intimidate AGC staff counsel.

The SBM argues that sanctions are necessary so that "lawyers engaged in prosecuting attorney discipline [cannot] avoid sanctions applicable to all other lawyers." This is not true. If a staff attorney engages in misconduct, there is nothing to prohibit an individual from contacting the administrator concerning his employee or from filing a request for investigation. The AGC's proposed rule prohibits *both* sides from requesting sanctions, except for certain witness costs.

The State Bar states that the AGC could seek sanctions against a respondent, however, this again loses sight of the purpose of discipline – to protect the public, the courts, and the legal profession. Collateral battles over sanctions would bog

down the system and would result in the need for increased staff at the AGC. Currently, staff does not log time on their files. If staff is to start keeping track of their hours so that sanctions may be sought, then the extra burden would result in the need for more employees at the AGC.

B. Summary of SBM Position:

The State Bar is not persuaded that the proposed change advances any necessary purpose, and further believes that eliminating the possibility of sanctions in appropriate cases could be contrary to justice. Existing Rule 9.125 already provides immunity from suit to a broad array of persons associated with the investigation and prosecution of complaints against lawyers "for conduct arising out of the performance of their duties." The SBM workgroup concluded that avoidance of sanctions beyond this immunity is not justified or necessary, and that it would send an inappropriate message if the lawyers engaged in prosecuting attorney discipline could avoid sanctions applicable to all other lawyers. In addition, because of this proposed provision's placement in a rule pertaining to "costs" that otherwise addresses costs taxed against a respondent, the workgroup believes that the proposed change inadvertently places a clear and inappropriate limitation on costs that could be assessed against *respondents* in a disciplinary proceeding. The SBM workgroup members other than the AGC representatives believed that such a provision is unnecessary given present protections, and dangerous in the rare circumstance in which a disciplinary employee might be engaging in serious misconduct related to a case.

COMPARISON OF CURRENT RULES, SBM WORKGROUP, AND PROPOSED AGC RULES

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
Rule 9.101 Definitions	**Rule 9.101** Definitions	**Rule 9.101** Definitions
As used in subchapter 9.100:	As used in subchapter 9.100:	As used in subchapter 9.100:
(1) "board" means the Attorney Discipline Board;	(1) "board" means the Attorney Discipline Board;	(1) "board" means the Attorney Discipline Board;
(2) "commission" means the Attorney Grievance Commission;	(2) "commission" means the Attorney Grievance Commission;	(2) "commission" means the Attorney Grievance Commission;
(3) "administrator" means the grievance administrator;	(3) "administrator" means the grievance administrator;	(3) "administrator" means the grievance administrator;
(4) "investigator" means a person designated by the administrator to assist him or her in the investigation of alleged misconduct or requested reinstatement;	(4) "investigator" means a person specially designated by the administrator to assist him or her in the investigation of alleged misconduct or requested reinstatement;	(4) "investigator" means a person specially designated by the administrator to assist him or her in the investigation of alleged misconduct or requested reinstatement;
(5) "attorney" means a person regularly licensed or specially admitted to practice law in Michigan;	(5) "attorney" or lawyer means a person regularly licensed, ~~or~~ specially admitted, permitted to practice law in Michigan on a temporary or other limited basis, or who is otherwise subject to the disciplinary authority of Michigan pursuant to order or rule of the Supreme Court;	(5) "attorney" or lawyer means a person regularly licensed, ~~or~~ specially admitted, permitted to practice law in Michigan on a temporary or other limited basis, or who is otherwise subject to the disciplinary authority of Michigan pursuant to order or rule of the Supreme Court;
(6) "respondent" means an attorney named	(6) "respondent" means an attorney	(6) "respondent" means an attorney

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
in a request for investigation or complaint;	named in a request for investigation or formal complaint, or proceedings for reciprocal discipline, based on a judgment of conviction, or transfers to inactive status under MCR 9.121;	named in a request for investigation or formal complaint, or proceedings for reciprocal discipline, based on a judgment of conviction, or transfers to inactive status under MCR 9.121;
(7) "request for investigation" means the first step in bringing alleged misconduct to the administrator's attention;	(7) "request for investigation" means the first step in bringing alleged misconduct to the administrator's attention;	(7) "request for investigation" means the first step in bringing alleged misconduct to the administrator's attention;
(8) "complaint" means the formal charge prepared by the administrator and filed with the board;	(8) "complaint" means the formal charge prepared by the administrator and filed with the board;	(8) "complaint" means the formal charge prepared by the administrator and filed with the board;
(9) "review" means examination by the board of a hearing panel's final order on petition by an aggrieved party;	(9) "review" means examination by the board of a hearing panel's ~~final~~ order on petition by ~~an aggrieved party~~ the administrator, complainant or respondent;	(9) "review" means examination by the board of a hearing panel's ~~final~~ order on petition by ~~an aggrieved party~~ the administrator, complainant or respondent;
(10) "appeal" means judicial re-examination by the Supreme Court of the board's final order on petition by an aggrieved party;	(10) "appeal" means judicial re-examination by the Supreme Court of the board's final order on petition by ~~an aggrieved party~~ the administrator, complainant or respondent;	(10) "appeal" means judicial re-examination by the Supreme Court of the board's final order on petition by ~~an aggrieved party~~ the administrator, complainant or respondent;
(11) "grievance" means alleged misconduct;	(11) "grievance" means alleged misconduct;	(11) "grievance" means alleged misconduct;
(12) "investigation" means fact finding on alleged misconduct under the administrator's direction.	(12) "investigation" means fact-finding on alleged misconduct under the administrator's direction.	(12) "investigation" means fact-finding on alleged misconduct under the administrator's direction.
(13) "disbarment" means revocation of the	(13) "disbarment" means revocation of the	(13) "disbarment" means revocation of

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
license to practice law.	license to practice law. (14) "complainant" means a person who signs a request for investigation. (15) "disability inactive status" means inactive status to which a lawyer has been transferred pursuant to MCR 9.121 or a similar rule of another jurisdiction.	the license to practice law. (14) "complainant" means a person who signs a request for investigation. (15) "disability inactive status" means inactive status to which a lawyer has been transferred pursuant to MCR 9.121 or a similar rule of another jurisdiction. (16) "disciplinary proceeding" means all matters filed with the board.
Rule 9.103 Standards of Conduct for Attorneys (A) General Principles. The license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice law. These standards include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court.	**Rule 9.103** Standards of Conduct for Attorneys (A) General Principles. The license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice law. These standards include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court.	**Rule 9.103** Standards of Conduct for Attorneys (A) General Principles. The license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice law. These standards include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(B) Duty to Assist Public to Request Investigation. An attorney shall assist a member of the public to communicate to the administrator, in appropriate form, a request for investigation of a member of the bar.	(B) Duty to Assist Public to Request Investigation. An attorney shall assist a member of the public to communicate to the administrator, in appropriate form, a request for investigation of a member of the bar.	(B) Duty to Assist Public to Request Investigation. An attorney shall assist a member of the public to communicate to the administrator, in appropriate form, a request for investigation of a member of the bar. An attorney shall not charge or collect a fee in connection with answering a request for investigation unless he or she is acting as counsel for a respondent in connection with a disciplinary investigation or proceeding.
(C) Duty to Assist Administrator. An attorney shall assist the administrator in the investigation, prosecution, and disposition of a request for investigation or complaint filed with or by the administrator.	(C) Duty to Assist Administrator. An attorney other than a respondent or respondent's attorney shall ~~assist~~ cooperate with the administrator in the investigation, prosecution, and disposition of a request for investigation or ~~complaint~~ disciplinary proceeding filed with or by the administrator.	(C) Duty to Assist Administrator. An attorney other than a respondent or respondent's attorney shall ~~assist~~ cooperate with the administrator in the investigation, prosecution, and disposition of a request for investigation or ~~complaint~~ disciplinary proceeding filed with or by the administrator.
Rule 9.104 Grounds for Discipline in General; Adjudication Elsewhere	**Rule 9.104** Grounds for Discipline in General; ~~Adjudication Elsewhere~~	**Rule 9.104** Grounds for Discipline in General; ~~Adjudication Elsewhere~~
(A) The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:	~~(A)~~ The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:	(A) The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:
(1) conduct prejudicial to the proper administration of justice;	~~(1) conduct prejudicial to the proper administration of justice;~~	(1) conduct prejudicial to the proper administration of justice;

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;	~~(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;~~	(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;
(3) conduct that is contrary to justice, ethics, honesty, or good morals;	~~(3) conduct that is contrary to justice, ethics, honesty, or good morals;~~	(3) conduct that is contrary to justice, ethics, honesty, or good morals;
(4) conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court;	~~(4)~~ (A) conduct that violates the standards or rules of professional ~~responsibility~~ conduct adopted by the Supreme Court;	(4) conduct that violates the standards or rules of professional conduct ~~responsibility~~ adopted by the Supreme Court;
(5) conduct that violates a criminal law of a state or of the United States;	~~(5) conduct that violates a criminal law of a state or of the United States;~~	(5) conduct that violates a criminal law of a state or of the United States (an ordinance, or tribal law pursuant to MCR 2.615);
(6) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;	~~(6)~~ (B) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;	(6) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;
(7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);	~~(7)~~(C) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);	(7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);
(8) contempt of the board or a hearing panel; or	~~(8)~~ (D) contempt of the board or a hearing panel; ~~or~~	(8) contempt of the board or a hearing panel; ~~or~~
(9) violation of an order of discipline.	~~(9)~~ (E) violation of an order of discipline.	(9) violation of an order of discipline; or (10) entering into an agreement or attempting to obtain an agreement, that:
		(a) the professional misconduct or the

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
		terms of a settlement of a claim for professional misconduct shall not be reported to the administrator; (b) the plaintiff shall withdraw a request for investigation or shall not cooperate with the investigation or prosecution of misconduct by the administrator; or, (c) the record of any civil action for professional misconduct shall be sealed from review by the administrator. (B) It is also misconduct and a ground for discipline if, through multiple acts and omissions, a lawyer demonstrates the absence of fitness to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counsel and as an officer of the court. MCR 9.103(A). This is misconduct for which discipline can be imposed for the protection of the public, the courts, and the legal profession. MCR 9.105. In proceedings brought under this subrule, prior acts and omissions of the lawyer are admissible.
(B) Proof of an adjudication of misconduct in a disciplinary proceeding by another state or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The	~~(B) Proof of an adjudication of misconduct in a disciplinary proceeding by another state or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The~~	~~(B) Proof of an adjudication of misconduct in a disciplinary proceeding by another state or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The~~

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate.	~~only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings, and whether imposition of identical discipline in Michigan would be clearly inappropriate.~~	~~only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings, and whether imposition of identical discipline in Michigan would be clearly inappropriate.~~
Rule 9.105 Purpose and Funding of Disciplinary Proceedings Discipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession. The fact that certain misconduct has remained unchallenged when done by others or when done at other times or has not been earlier made the subject of disciplinary proceedings is not an excuse. The legal profession, through the State Bar of Michigan, is responsible for the reasonable and necessary expenses of the board, the commission, and the administrator, as determined by the Supreme Court. Commissioners of the State Bar of Michigan may not represent respondents in proceedings before the board, including preliminary discussions	**Rule 9.105** Purpose and Funding of Disciplinary Proceedings (A) Purpose. Discipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession. The fact that certain misconduct has remained unchallenged when done by others or when done at other times or has not been earlier made the subject of disciplinary proceedings is not an excuse. (B) Funding. The legal profession, through the State Bar of Michigan, is responsible for the reasonable and necessary expenses of the board, the commission, and the administrator, as determined by the Supreme Court. ~~Commissioners of the State Bar of Michigan may not represent respondents in proceedings before the board, including~~	**Rule 9.105** Purpose and Funding of Disciplinary Proceedings (A) Purpose. Discipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession. The fact that certain misconduct has remained unchallenged when done by others or when done at other times or has not been earlier made the subject of disciplinary proceedings is not an excuse. Disciplinary proceedings are sui generis, with both elements of civil and criminal procedure having applicability unless otherwise provided. (B) Funding. The legal profession, through the State Bar of Michigan, is responsible for the reasonable and necessary expenses of the board, the commission, and the administrator, as determined by the Supreme Court. ~~Commissioners of the State Bar of Michigan may not represent respondents in proceedings before the board.~~

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
with commission employees prior to the filing of a request for investigation.	~~preliminary discussions with commission employees prior to the filing of a request for investigation.~~	~~including preliminary discussions with commission employees prior to the filing of a request for investigation.~~
Rule 9.106 Types of Discipline; Minimum Discipline; Admonishment Misconduct is grounds for: (1) revocation of the license to practice law in Michigan; (2) suspension of the license to practice law in Michigan for a specified term, not less than 30 days, with such additional conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose, and, if the term exceeds 179 days, until the further order of a hearing panel, the board, or the Supreme Court; (3) reprimand with such conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose; (4) probation ordered by a hearing panel, the board, or the Supreme Court under MCR 9.121(C); (5) requiring restitution, in an amount set	**Rule 9.106** Types of Discipline; Minimum Discipline;~~Admonishment~~ Misconduct is grounds for: (1) ~~revocation of the license to~~ disbarment of an attorney from the practice of law in Michigan; (2) suspension of the license to practice law in Michigan for a specified term, not less than 30 days, with such additional conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose, and, if the term exceeds 179 days, until the further order of a hearing panel, the board, or the Supreme Court; (3) reprimand with such conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose; (4) probation ordered by a hearing panel, the board, or the Supreme Court under MCR 9.121(C); or (5) requiring restitution, in an amount set	**Rule 9.106** Types of Discipline; Minimum Discipline;~~Admonishment~~ Misconduct is grounds for: (1) ~~revocation of the license to~~ disbarment of an attorney from the practice of law in Michigan; (2) suspension of the license to practice law in Michigan for a specified term, not less than 30 days, with such additional conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose, and, if the term exceeds 179 days, until the further order of a hearing panel, the board, or the Supreme Court; (3) reprimand with such conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose; (4) probation ordered by a hearing panel, the board, or the Supreme Court under MCR 9.121(C); or (5) requiring restitution, in an amount set

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
by a hearing panel, the board, or the Supreme Court, as a condition of an order of discipline; or (6) with the respondent's consent, admonishment by the commission without filing a complaint. An admonition does not constitute discipline and shall be confidential under MCR 9.126 except as provided by MCR 9.115(D)(3). The administrator shall notify the respondent of the provisions of this rule and the respondent may, within 21 days of service of the admonition, notify the commission in writing that respondent objects to the admonition. Upon timely receipt of the written objection, the commission shall vacate the admonition and either dismiss the request for investigation or authorize the filing of a complaint.	by a hearing panel, the board, or the Supreme Court, as a condition of an order of discipline;~~, or~~ ~~(6) with the respondent's consent, admonishment by the commission without filing a complaint. An admonition does not constitute discipline and shall be confidential under MCR 9.126 except as provided by MCR 9.115(D)(3). The administrator shall notify the respondent of the provisions of this rule and the respondent may, within 21 days of service of the admonition, notify the commission in writing that respondent objects to the admonition. Upon timely receipt of the written objection, the commission shall vacate the admonition and either dismiss the request for investigation or authorize the filing of a complaint.~~	by a hearing panel, the board, or the Supreme Court, as a condition of an order of discipline;~~, or~~ ~~(6) with the respondent's consent, admonishment by the commission without filing a complaint. An admonition does not constitute discipline and shall be confidential under MCR 9.126 except as provided by MCR 9.115(D)(3). The administrator shall notify the respondent of the provisions of this rule and the respondent may, within 21 days of service of the admonition, notify the commission in writing that respondent objects to the admonition. Upon timely receipt of the written objection, the commission shall vacate the admonition and either dismiss the request for investigation or authorize the filing of a complaint.~~
Rule 9.107 Rules Exclusive on Discipline (A) Proceedings for Discipline. Subchapter 9.100 governs the procedure to discipline attorneys. A proceeding under subchapter 9.100 is subject to the superintending control of the Supreme Court. An investigation or proceeding may not be held invalid because of a nonprejudicial irregularity or an error not	**Rule 9.107** Rules Exclusive on Discipline (A) Proceedings for Discipline. Subchapter 9.100 governs the procedure to discipline attorneys. A proceeding under subchapter 9.100 is subject to the superintending control of the Supreme Court. An investigation or proceeding may not be held invalid because of a nonprejudicial irregularity or an error not	**Rule 9.107** Rules Exclusive on Discipline (A) Proceedings for Discipline. Subchapter 9.100 governs the procedure to discipline attorneys. A proceeding under subchapter 9.100 is subject to the superintending control of the Supreme Court. An investigation or proceeding may not be held invalid because of a nonprejudicial irregularity or an error not

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
resulting in a miscarriage of justice. (B) Local Bar Associations. A local bar association may not conduct a separate proceeding to discipline an attorney, but must assist and cooperate with the administrator in reporting and investigating alleged misconduct of an attorney.	resulting in a miscarriage of justice. (B) Local Bar Associations. A local bar association may not conduct a separate proceeding to discipline an attorney~~, but must assist and cooperate with the administrator in reporting and investigating alleged misconduct of an attorney~~.	resulting in a miscarriage of justice. (B) Local Bar Associations. A local bar association may not conduct a separate proceeding to discipline an attorney~~, but must assist and cooperate with the administrator in reporting and investigating alleged misconduct of an attorney~~.
Rule 9.108 Attorney Grievance Commission (A) Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys and those temporarily admitted to practice under MCR 8.126. (B) Composition. The commission consists of 3 laypersons and 6 attorneys appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms. (C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the commission a chairperson and a vice-chairperson who shall serve 1-year terms in those offices. The commencement and termination dates	**Rule 9.108** Attorney Grievance Commission (A) Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys and those temporarily admitted to practice under MCR 8.126 or otherwise subject to the disciplinary authority of the Supreme Court. (B) Composition. The commission consists of 3 laypersons and 6 attorneys appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms. (C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the commission a chairperson and a vice-chairperson who shall serve 1-year terms in those offices. The commencement and termination dates	**Rule 9.108** Attorney Grievance Commission (A) Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys and those temporarily admitted to practice under MCR 8.126 or otherwise subject to the disciplinary authority of the Supreme Court. (B) Composition. The commission consists of 3 laypersons and 6 attorneys appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms. (C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the commission a chairperson and a vice-chairperson who shall serve 1-year terms in those offices. The commencement and termination

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
for the 1-year terms shall coincide appropriately with the 3-year membership terms of those officers and the other commission members. The Supreme Court may reappoint these officers for additional terms and may remove these officers prior to the expiration of a term. An officer appointed to fill a mid-term vacancy shall serve the remainder of that term and may be reappointed to serve a full term.	for the 1-year terms shall coincide appropriately with the 3-year membership terms of those officers and the other commission members. The Supreme Court may reappoint these officers for additional terms and may remove these officers prior to the expiration of a term. An officer appointed to fill a mid-term vacancy shall serve the remainder of that term and may be reappointed to serve ~~a full term~~ up to 2 more full terms.	dates for the 1-year terms shall coincide appropriately with the 3-year membership terms of those officers and the other commission members. The Supreme Court may reappoint these officers for additional terms and may remove these officers prior to the expiration of a term. An officer appointed to fill a mid-term vacancy shall serve the remainder of that term and may be reappointed to serve ~~a full term~~ up to 2 more full terms.
(D) Internal Rules.	(D) Internal Rules.	(D) Internal Rules.
(1) The commission must elect annually from among its membership a secretary to keep the minutes of the commission's meetings and issue the required notices.	(1) The commission must elect annually from among its membership a secretary to keep the minutes of the commission's meetings and issue the required notices.	(1) The commission must elect annually from among its membership a secretary to keep the minutes of the commission's meetings and issue the required notices.
(2) Five members constitute a quorum. The commission acts by majority vote of the members present.	(2) Five members constitute a quorum. The commission acts by majority vote of the members ~~present~~ participating in the meeting.	(2) Five members constitute a quorum. The commission acts by majority vote of the members ~~present~~ participating in the meeting.
(3) The commission must meet monthly at a time and place the chairperson designates. Notice of a regular monthly meeting is not required.	(3) The commission must meet monthly at a time and place the chairperson designates. Notice of a regular monthly meeting is not required.	(3) The commission must meet monthly at a time and place the chairperson designates. Notice of a regular monthly meeting is not required.
(4) A special meeting may be called by the chairperson or by petition of 3 commission members on 7 days' written notice. The notice may be waived in	(4) A special meeting may be called by the chairperson or by petition of 3 commission members on 7 days' written notice. The notice may be waived in	(4) A special meeting may be called by the chairperson or by petition of 3 commission members on 7 days' written notice. The notice may be waived in

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
writing or by attending the meeting.	writing or by attending the meeting. Special meetings may be conducted through electronic means.	writing or by attending the meeting. Special meetings may be conducted through electronic means.
(E) Powers and Duties. The commission has the power and duty to:	(E) Powers and Duties. The commission has the power and duty to:	(E) Powers and Duties. The commission has the power and duty to:
(1) recommend attorneys to the Supreme Court for appointment as administrator and deputy administrator;	(1) recommend attorneys to the Supreme Court for appointment as administrator ~~and deputy administrator~~;	(1) recommend attorneys to the Supreme Court for appointment as administrator ~~and deputy administrator~~;
(2) supervise the investigation of attorney misconduct, including requests for investigation of and complaints against attorneys;	(2) supervise the investigation of attorney misconduct, including requests for investigation of and complaints against attorneys;	(2) supervise the investigation of attorney misconduct, including requests for investigation of and complaints against attorneys;
(3) supervise the administrator and his or her staff;	(3) supervise the administrator ~~and his or her staff~~;	(3) supervise the administrator ~~and his or her staff~~;
(4) seek an injunction from the Supreme Court against an attorney's misconduct when prompt action is required, even if a disciplinary proceeding concerning that conduct is not pending before the board;	(4) seek an injunction from the Supreme Court against an attorney's misconduct when prompt action is required, even if a disciplinary proceeding concerning that conduct is not pending before the board;	(4) seek an injunction from the Supreme Court against an attorney's misconduct when prompt action is required, even if a disciplinary proceeding concerning that conduct is not pending before the board;
(5) annually write a budget for the commission and the administrator's office (including compensation) and submit it to the Supreme Court for approval;	(5) annually ~~write~~ propose a budget for the commission and the administrator's office, ~~(~~including compensation,~~)~~ and submit it to the Supreme Court for approval;	(5) annually ~~write~~ propose a budget for the commission and the administrator's office, ~~(~~including compensation,~~)~~ and submit it to the Supreme Court for approval;
(6) submit to the Supreme Court proposed changes in these rules;	(6) submit to the Supreme Court proposed changes in these rules; and,	(6) submit to the Supreme Court proposed changes in these rules; and,

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(7) report to the Supreme Court at least quarterly regarding its activities, and to submit a joint annual report with the Attorney Discipline Board that summarizes the activities of both agencies during the past year; and	~~(7) report to the Supreme Court at least quarterly regarding its activities, and to submit a joint annual report with the Attorney Discipline Board that summarizes the activities of both agencies during the past year; and~~	~~(7) report to the Supreme Court at least quarterly regarding its activities, and to submit a joint annual report with the Attorney Discipline Board that summarizes the activities of both agencies during the past year; and~~
(8) compile and maintain a list of out-of-state attorneys who have been admitted to practice temporarily and the dates those attorneys were admitted, and otherwise comply with the requirements of MCR 8.126, and	(~~8~~)(7) compile and maintain a list of out-of-state attorneys who have been admitted to practice temporarily and the dates those attorneys were admitted, and otherwise comply with the requirements of MCR 8.126, and	(~~8~~)(7) compile and maintain a list of out-of-state attorneys who have been admitted to practice temporarily and the dates those attorneys were admitted, and otherwise comply with the requirements of MCR 8.126, and
		(~~9~~)(8) create and maintain trusts or other appropriate investment vehicles to invest funds related to staff health care or budgetary surplus; and
(9) perform other duties provided in these rules.	(~~9~~)(8) perform other duties provided in these rules.	(9) perform other duties provided in these rules.
Rule 9.109 Grievance Administrator	**Rule 9.109** Grievance Administrator	**Rule 9.109** Grievance Administrator
(A) Appointment. The administrator and the deputy administrator must be attorneys. The commission shall recommend one or more candidates for appointment as administrator and deputy administrator. The Supreme Court shall appoint the administrator and the deputy administrator, may terminate their	(A) Appointment. The administrator and the deputy administrator must be attorneys. The commission shall recommend one or more candidates for appointment as administrator and deputy administrator. The Supreme Court shall appoint the administrator and the deputy administrator, may terminate their	(A) Appointment. The administrator and the deputy administrator must be attorneys. The commission may ~~shall~~ recommend one or more candidates for appointment as administrator and deputy administrator. The Supreme Court shall appoint the administrator and the deputy administrator, may terminate their

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
appointments at any time with or without cause, and shall determine their salaries and the other terms and conditions of their employment.	appointments at any time with or without cause, and shall determine their salaries and the other terms and conditions of their employment.	appointments at any time with or without cause, and shall determine their salaries and the other terms and conditions of their employment.
(B) Powers and Duties. The administrator has the power and duty to:	(B) Powers and Duties. The administrator has the power and duty to:	(B) Powers and Duties. The administrator has the power and duty to:
(1) employ or retain attorneys, investigators, and staff with the approval of the commission;	(1) employ or retain attorneys, investigators, and staff with the approval of the commission;	(1) employ or retain a deputy administrator, attorneys, investigators, and staff ~~with the approval of the commission~~;
(2) supervise the attorneys, investigators, and staff;	(2) supervise the attorneys, investigators, and staff;	(2) supervise the attorneys, investigators, and staff;
(3) assist the public in preparing requests for investigation;	(3) assist the public in preparing requests for investigation;	(3) assist the public in preparing requests for investigation;
(4) maintain the commission records created as a result of these rules;	(4) maintain the commission records created as a result of these rules;	(4) maintain the commission records created as a result of these rules;
(5) investigate alleged misconduct of attorneys, including serving a request for investigation in his or her own name if necessary;	(5) investigate alleged misconduct of attorneys, including ~~serving a request for~~ initiating an investigation in his or her own name if necessary;	(5) investigate alleged misconduct of attorneys, including ~~serving a request for~~ initiating an investigation in his or her own name if necessary;
(6) prosecute complaints the commission authorizes;	(6) prosecute complaints the commission authorizes;	(6) prosecute complaints the commission authorizes;
(7) prosecute or defend reviews and appeals as the commission authorizes; and	(7) prosecute or defend reviews and appeals as the commission authorizes; ~~and~~	(7) prosecute or defend reviews and appeals as the commission authorizes; ~~and~~

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	(8) report to the Supreme Court at least quarterly regarding its activities, and to submit a joint annual report with the board that summarizes the activities of both agencies during the past year; and	(8) report to the Supreme Court at least quarterly regarding its activities, and to submit a joint annual report with the board that summarizes the activities of both agencies during the past year; and
(8) perform other duties provided in these rules or assigned by the commission.	(~~8~~9) perform other duties provided in these rules or assigned by the commission.	(~~8~~9) perform other duties provided in these rules or assigned by the commission.
(C) Legal Counsel for the Administrator.	(C) Legal Counsel for the Administrator.	(C) Legal Counsel for the Administrator.
(1) The administrator may appoint and retain volunteer legal counsel needed to prosecute proceedings under these rules.	(1) The administrator may appoint and retain volunteer legal counsel needed to prosecute proceedings under these rules.	(1) The administrator may appoint and retain volunteer legal counsel needed to prosecute proceedings under these rules.
(2) Legal counsel may	(2) Legal counsel may	(2) Legal counsel may
(a) prepare and file complaints and notices of hearings;	(a) ~~prepare and file complaints and notices of hearings~~ commence disciplinary proceedings by filing pleadings or notices;	(a) ~~prepare and file complaints and notices of hearings~~ commence disciplinary proceedings by filing pleadings or notices;
(b) present evidence relating to complaints or petitions for reinstatement;	(b) present evidence relating to ~~complaints or petitions for reinstatement~~ disciplinary and court proceedings;	(b) present evidence relating to ~~complaints or petitions for reinstatement~~ disciplinary and court proceedings;
(c) prepare and file arguments and briefs;	(c) prepare and file arguments and briefs;	(c) prepare and file arguments and briefs;
(d) inform the administrator about the progress of cases assigned; and	(d) inform the administrator about the progress of cases assigned; and	(d) inform the administrator about the progress of cases assigned; and
(e) perform other duties assigned by the administrator.	(e) perform other duties assigned by the administrator.	(e) perform other duties assigned by the administrator.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
Rule 9.110 Attorney Discipline Board	**Rule 9.110** Attorney Discipline Board	**Rule 9.110** Attorney Discipline Board
(A) Authority of Board. The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys.	(A) Authority of Board. The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys and those temporarily admitted to practice under MCR 8.126 or otherwise subject to the disciplinary authority of the Supreme Court.	(A) Authority of Board. The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys and those temporarily admitted to practice under MCR 8.126 or otherwise subject to the disciplinary authority of the Supreme Court.
(B) Composition. The board consists of 6 attorneys and 3 laypersons appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.	(B) Composition. The board consists of 6 attorneys and 3 laypersons appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.	(B) Composition. The board consists of 6 attorneys and 3 laypersons appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.
(C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the board a chairperson and a vice-chairperson who shall serve 1-year terms in those offices. The commencement and termination dates of the 1-year terms shall coincide appropriately with the 3-year board terms of those officers and the other board members. The Supreme Court may reappoint these officers for additional terms and may remove an officer prior to the expiration of a term. An officer appointed to fill a midterm vacancy shall serve the remainder of that term and may be reappointed to serve a full term.	(C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the board a chairperson and a vice-chairperson who shall serve 1-year terms in those offices. The commencement and termination dates of the 1-year terms shall coincide appropriately with the 3-year board terms of those officers and the other board members. The Supreme Court may reappoint these officers for additional terms and may remove an officer prior to the expiration of a term. An officer appointed to fill a midterm vacancy shall serve the remainder of that term and may be reappointed to serve two full terms.	(C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the board a chairperson and a vice-chairperson who shall serve 1-year terms in those offices. The commencement and termination dates of the 1-year terms shall coincide appropriately with the 3-year board terms of those officers and the other board members. The Supreme Court may reappoint these officers for additional terms and may remove an officer prior to the expiration of a term. An officer appointed to fill a midterm vacancy shall serve the remainder of that term and may be reappointed to serve two full terms.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(D) Internal Rules.	(D) Internal Rules.	(D) Internal Rules.
(1) The board must elect annually from among its membership a secretary to supervise the keeping of the minutes of the board's meetings and the issuance of the required notices.	(1) The board must elect annually from among its membership a secretary to supervise the keeping of the minutes of the board's meetings and the issuance of the required notices.	(1) The board must elect annually from among its membership a secretary to supervise the keeping of the minutes of the board's meetings and the issuance of the required notices.
(2) Five members constitute a quorum. The board acts by a majority vote of the members present.	(2) Five members constitute a quorum. The board acts by a majority vote of the members present.	(2) Five members constitute a quorum. The board acts by a majority vote of the members present.
(3) The board shall meet monthly as often as necessary to maintain a current docket, but no less than every 2 months, at a time and place the chairperson designates.	(3) The board shall meet monthly as often as necessary to maintain a current docket, but no less than every 2 months, at a time and place the chairperson designates.	(3) The board shall meet monthly as often as necessary to maintain a current docket, but no less than every 2 months, at a time and place the chairperson designates.
(4) A special meeting may be called by the chairperson or by petition of 3 board members on 7 days' written notice. The notice may be waived in writing or by attending the meeting.	(4) A special meeting may be called by the chairperson or by petition of 3 board members on 7 days' written notice. The notice may be waived in writing or by attending the meeting.	(4) A special meeting may be called by the chairperson or by petition of 3 board members on 7 days' written notice. The notice may be waived in writing or by attending the meeting.
(E) Powers and Duties. The board has the power and duty to:	(E) Powers and Duties. The board has the power and duty to:	(E) Powers and Duties. The board has the power and duty to:
(1) appoint an attorney to serve as its general counsel and executive director;	(1) appoint an attorney to serve as its general counsel and executive director;	(1) appoint an attorney to serve as its general counsel and executive director;
(2) appoint hearing panels and masters;	(2) appoint hearing panels, ~~and~~ masters, monitors, and mentors;	(2) appoint hearing panels, ~~and~~ masters, monitors, and mentors;

CURRENT MICHIGAN RULE	SBM WORK/GROUP PROPOSAL	AGC PROPOSAL
(3) assign a complaint to a hearing panel or to a master;	(3) assign a ~~complaint~~ disciplinary proceeding to a hearing panel or to a master;	(3) assign a ~~complaint~~ disciplinary proceeding to a hearing panel or to a master;
(4) on request of the respondent, the administrator, or the complainant, review a final order of discipline or dismissal by a hearing panel;	(4) on request of the respondent, the administrator, or the complainant, review a final order of discipline or dismissal by a hearing panel;	(4) on request of the respondent, the administrator, or the complainant, review a final order of discipline or dismissal by a hearing panel;
	(5) on request of the administrator or respondent, review a petition for leave to appeal and a petition for leave to review a non-final order;	(5) on request of the administrator or respondent, review a petition for leave to appeal and a petition for leave to review a non-final order;
(5) discipline and reinstate attorneys under these rules;	~~(5)~~(6) discipline and reinstate attorneys under these rules;	~~(5)~~(6) discipline and reinstate attorneys under these rules and exercise continuing jurisdiction over orders of discipline and reinstatement;
(6) file with the Supreme Court clerk its orders of suspension, disbarment, and reinstatement;	~~(6)~~(7) file with the Supreme Court clerk its orders of suspension, disbarment, and reinstatement;	~~(6)~~(7) file with the Supreme Court clerk its orders of suspension, disbarment, and reinstatement;
(7) annually write a budget for the board and submit it to the Supreme Court for approval;	~~(7)~~(8) annually propose ~~write~~ a budget for the board and submit it to the Supreme Court for approval;	~~(7)~~(8) annually propose ~~write~~ a budget for the board and submit it to the Supreme Court for approval;
(8) report to the Supreme Court at least quarterly regarding its activities, and to submit a joint annual report with the Attorney Grievance Commission that summarizes the activities of both agencies during the past year; and	~~(8)~~(9) report to the Supreme Court at least quarterly regarding its activities, and to submit a joint annual report with the Attorney Grievance Commission that summarizes the activities of both agencies during the past year; and	~~(8)~~(9) report to the Supreme Court at least quarterly regarding its activities, and to submit a joint annual report with the Attorney Grievance Commission that summarizes the activities of both agencies during the past year; and

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(9) submit to the Supreme Court proposed changes in these rules.	(9)(10) submit to the Supreme Court proposed changes in these rules.	(9)(10) submit to the Supreme Court proposed changes in these rules.
Rule 9.111 Hearing Panels (A) Composition; Quorum. The board must annually appoint 3 attorneys to each hearing panel and must fill a vacancy as it occurs. Following appointment, the board may designate the panel's chairperson, vice-chairperson and secretary. Thereafter, a hearing panel may elect a chairperson, vice-chairperson and secretary. A hearing panel must convene at the time and place designated by its chairperson or by the board. Two members constitute a quorum. A hearing panel acts by a majority vote. If a panel is unable to reach a majority decision, the matter shall be referred to the board for reassignment to a new panel. (B) Powers and Duties. A hearing panel shall do the following: (1) Hold a public hearing on a complaint or reinstatement petition assigned to it within 56 days after the date the complaint is filed with the board or the date that notice of the reinstatement petition is published. A hearing must be concluded	**Rule 9.111** Hearing Panels (A) Composition; Quorum. The board must establish hearing panels from a list of volunteer lawyers maintained by its executive director. The board must annually appoint 3 attorneys to each hearing panel and must fill a vacancy as it occurs. Following appointment, the board may designate the panel's chairperson, vice-chairperson and secretary. Thereafter, a hearing panel may elect a chairperson, vice-chairperson and secretary. A hearing panel must convene at the time and place designated by its chairperson or by the board. Two members constitute a quorum. A hearing panel acts by a majority vote. If a panel is unable to reach a majority decision, the matter shall be referred to the board for reassignment to a new panel. (B) Powers and Duties. A hearing panel shall do the following: (1) ~~Hold~~ Schedule a public hearing on a complaint, judgment of conviction, or reciprocal discipline proceedings ~~reinstatement petition assigned to it~~ within 56 days after the matter is filed with the board, ~~date the complaint is filed with the~~	**Rule 9.111** Hearing Panels (A) Composition; Quorum. The board must establish hearing panels from a list of volunteer lawyers maintained by its executive director. The board must annually appoint 3 attorneys to each hearing panel and must fill a vacancy as it occurs. Following appointment, the board may designate the panel's chairperson, vice-chairperson and secretary. Thereafter, a hearing panel may elect a chairperson, vice-chairperson and secretary. A hearing panel must convene at the time and place designated by its chairperson or by the board. Two members constitute a quorum. A hearing panel acts by a majority vote. If a panel is unable to reach a majority decision, the matter shall be referred to the board for reassignment to a new panel. (B) Powers and Duties. A hearing panel shall do the following: (1) ~~Hold~~ Schedule a public hearing on a ~~complaint~~ disciplinary proceeding, judgment of conviction, or reciprocal discipline proceeding ~~reinstatement petition assigned to it~~ within 56 days after the matter is filed with the board,

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
within 91 days after it is begun, unless the board grants an extension for good cause.	~~board or the date that notice of the reinstatement petition is published.~~ A hearing must be concluded within 91 days after it is begun, unless the board grants an extension for good cause.	~~date the complaint is filed with the board or the date that notice of the reinstatement petition is published.~~ A hearing must be concluded within 91 days after it is begun, unless the board grants an extension for good cause.
(2) Receive evidence and make written findings of fact.	(2) Receive evidence and make written findings of fact.	(2) Receive evidence and make written findings of fact.
(3) Discipline and reinstate attorneys or dismiss a complaint by order, under these rules.	(3) Discipline and reinstate attorneys or dismiss a complaint by order~~,~~ under these rules.	(3) Discipline and reinstate attorneys or dismiss a complaint by order~~,~~ under these rules and exercise continuing jurisdiction over its orders of discipline and reinstatement.
(4) Report its actions to the board within 28 days after the conclusion of a hearing.	(4) Report its actions to the board within ~~28 days after the conclusion of a hearing~~ 35 days of the later of the filing of the transcript or the closing of the record, unless extended by the board chairperson.	(4) Report its actions to the board within ~~28 days after the conclusion of a hearing~~ 35 days of the later of the filing of the transcript or the closing of the record, unless extended by the board chairperson.
(5) Perform other duties provided in these rules.	(5) Perform other duties provided in these rules.	(5) Perform other duties provided in these rules.
Rule 9.112 Requests for Investigation	**Rule 9.112** Requests for Investigation	**Rule 9.112** Requests for Investigation
(A) Availability to Public. The administrator shall furnish a form for a request for investigation to a person who alleges misconduct against an attorney. Forms must be available to the public through each state bar office and county clerk's office. Use of the form is not	(A) Availability to Public. The administrator shall furnish a form for a request for investigation to a person who alleges misconduct against an attorney. ~~Forms must be available to the public through each state bar office and county clerk's office.~~ Use of the form is not	(A) Availability to Public. The administrator shall furnish a form for a request for investigation to a person who alleges misconduct against an attorney. ~~Forms must be available to the public through each state bar office and county clerk's office.~~ Use of the form is not

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
required for filing a request for investigation.	required for filing a request for investigation.	required for filing a request for investigation.
(B) Form of Request. A request for investigation of alleged misconduct must	(B) Form of Request. A request for investigation of alleged misconduct must	(B) Form of Request. A request for investigation of alleged misconduct must
(1) be in writing;	(1) be in writing;	(1) be in writing;
(2) describe the alleged misconduct, including the approximate time and place of it;	(2) describe the alleged misconduct, including the approximate time and place of it;	(2) describe the alleged misconduct, including the approximate time and place of it;
(3) be signed by the complainant; and	(3) be signed by the complainant; and	(3) be signed by the complainant; and
(4) be filed with the administrator.	(4) be filed with the administrator.	(4) be filed with the administrator.
(C) Handling by Administrator.	(C) Handling by Administrator.	(C) Handling by Administrator.
(1) Request for Investigation of Attorney. After making a preliminary investigation, the administrator shall either	(1) Request for Investigation of Attorney. After ~~making~~ a preliminary review ~~investigation~~, the administrator shall either	(1) Request for Investigation of Attorney. After ~~making~~ a preliminary review ~~investigation~~, the administrator shall either
(a) notify the complainant and the respondent that the allegations of the request for investigation are inadequate, incomplete, or insufficient to warrant the further attention of the commission; or	(a) notify the complainant and the respondent that the allegations of the request for investigation are inadequate, incomplete, or insufficient to warrant the further attention of the commission; or	(a) notify the complainant and the respondent that the allegations of the request for investigation are inadequate, incomplete, or insufficient to warrant the further attention of the commission; or
(b) serve a copy of the request for investigation on the respondent by ordinary mail at the respondent's address on file with the State Bar as required by Rule 2 of the Supreme Court Rules	(b) serve a copy of the request for investigation on the respondent by ordinary mail at the respondent's address on file with the State Bar as required by Rule 2 of the Supreme Court Rules	(b) serve a copy of the request for investigation on the respondent by ordinary mail at the respondent's address on file with the State Bar as required by Rule 2 of the Supreme Court Rules

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
Concerning the State Bar of Michigan. Service is effective at the time of mailing, and nondelivery does not affect the validity of service. If a respondent has not filed an answer, no formal complaint shall be filed with the board unless the administrator has served the request for investigation by registered or certified mail return receipt requested.	Concerning the State Bar of Michigan. Service is effective at the time of mailing, and nondelivery does not affect the validity of service. If a respondent has not filed an answer, no formal complaint shall be filed with the board unless the administrator has served the request for investigation by registered or certified mail return receipt requested.	Concerning the State Bar of Michigan. Service is effective at the time of mailing, and nondelivery does not affect the validity of service. If a respondent has not filed an answer, no formal complaint shall be filed with the board unless the administrator has served the request for investigation by registered or certified mail return receipt requested.
(2) Request for Investigation of Judge. The administrator shall forward to the Judicial Tenure Commission a request for investigation of a judge, even if the request arises from the judge's conduct before he or she became a judge or from conduct unconnected with his or her judicial office. MCR 9.116 thereafter governs.	(2) Request for Investigation of Judge. The administrator shall forward to the Judicial Tenure Commission a request for investigation of a judge, even if the request arises from the judge's conduct before he or she became a judge or from conduct unconnected with his or her judicial office. MCR 9.116 thereafter governs.	(2) Request for Investigation of Judge. The administrator shall forward to the Judicial Tenure Commission a request for investigation of a judge, even if the request arises from the judge's conduct before he or she became a judge or from conduct unconnected with his or her judicial office. MCR 9.116 thereafter governs.
(3) Request for Investigation of Member or Employee of Commission or Board. Except as modified by MCR 9.131, MCR 9.104-9.130 apply to a request for investigation of an attorney who is a member of or is employed by the board or the commission.	(3) Request for Investigation of Member or Employee of Commission or Board. Except as modified by MCR 9.131, MCR 9.104-9.130 apply to a request for investigation of an attorney who is a member of or is employed by the board or the commission.	(3) Request for Investigation of Member or Employee of Commission or Board. Except as modified by MCR 9.131, MCR 9.104-9.130 apply to a request for investigation of an attorney who is a member of or is employed by the board or the commission.
(D) Subpoenas.	(D) Subpoenas.	(D) Subpoenas.
(1) After the request for investigation has been served on the respondent, the commission may issue subpoenas to require the appearance of a witness or the	(1) After the request for investigation has been served on the respondent, the commission may issue subpoenas to require the appearance of a witness or the	(1) After the request for investigation has been served on the respondent, the commission may issue subpoenas to require the appearance of a witness or the

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
production of documents or other tangible things concerning matters then under investigation. Documents or other tangible things so produced may be subjected to nondestructive testing. Subpoenas shall be returnable before the administrator or a person designated by the administrator.	production of documents or other tangible things concerning matters then under investigation. Upon request filed with the board, the board chairperson may quash or modify the subpoena if compliance would be unreasonable or oppressive. Documents or other tangible things so produced may be retained by the grievance administrator, copied, or may be subjected to nondestructive testing. Subpoenas shall be returnable before the administrator or a person designated by the administrator.	production of documents or other tangible things concerning matters then under investigation. Documents or other tangible things so produced may be retained by the grievance administrator, copied, or may be subjected to nondestructive testing. Subpoenas shall be returnable before the administrator or a person designated by the administrator.
(2) A person who without just cause, after being commanded by a subpoena, fails or refuses to appear or give evidence, to be sworn or affirmed, or to answer a proper question after being ordered to do so is in contempt. The administrator may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.	(2) A person who without just cause, after being commanded by a subpoena, fails or refuses to appear or give evidence, to be sworn or affirmed, or to answer a proper question after being ordered to do so is in contempt. The administrator may initiate a contempt proceeding before the board chairperson or his or her designee, or under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred. In the event of a finding of contempt by the respondent, the respondent's license to practice law may be suspended until he or she complies with the order of the board chairperson or his or her designee.	(2) A person who without just cause, after being commanded by a subpoena, fails or refuses to appear or give evidence, to be sworn or affirmed, or to answer a proper question after being ordered to do so is in contempt. Upon request filed with the board, the board chairperson may quash or modify the subpoena issued to a respondent if compliance would be unreasonable or oppressive. The administrator may initiate a contempt proceeding before the board chairperson or his or her designee, or under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred. In the event of a finding of contempt by the respondent, the respondent's license to practice law may be suspended until he or she complies with the order of the board chairperson or

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
		his or her designee.
(3) A subpoena issued pursuant to this subrule and certified by the commission chairperson shall be sufficient authorization for taking a deposition or seeking the production of evidence outside the State of Michigan. If the deponent or the person possessing the subpoenaed evidence will not comply voluntarily, the proponent of the subpoena may utilize MCR 2.305(D) or any similar provision in a statute or court rule of Michigan or of the state, territory, or country where the deponent or possessor resides or is present.	(3) A subpoena issued pursuant to this subrule and certified by the commission chairperson shall be sufficient authorization for taking a deposition or seeking the production of evidence outside the State of Michigan. If the deponent or the person possessing the subpoenaed evidence will not comply voluntarily, the proponent of the subpoena may utilize MCR 2.305(D) or any similar provision in a statute or court rule of Michigan or of the state, territory, or country where the deponent or possessor resides or is present. (4) Upon receipt of a subpoena certified to be duly issued under the rules or laws of another lawyer disciplinary or admissions jurisdiction, the administrator may issue a subpoena directing a person domiciled or found within the state of Michigan to give testimony and/or produce documents or other things for use in the other lawyer disciplinary proceedings as directed in the subpoena of the other jurisdiction. The practice and procedure applicable to subpoenas issued under this subdivision shall be that of the other jurisdiction, except that:	(3) A subpoena issued pursuant to this subrule and certified by the commission chairperson shall be sufficient authorization for taking a deposition or seeking the production of evidence outside the State of Michigan. If the deponent or the person possessing the subpoenaed evidence will not comply voluntarily, the proponent of the subpoena may utilize MCR 2.305(D) or any similar provision in a statute or court rule of Michigan or of the state, territory, or country where the deponent or possessor resides or is present. (4) Upon receipt of a subpoena certified to be duly issued under the rules or laws of another lawyer disciplinary or admissions jurisdiction, the administrator may issue a subpoena directing a person domiciled or found within the state of Michigan to give testimony and/or produce documents or other things for use in the other lawyer disciplinary proceedings as directed in the subpoena of the other jurisdiction. The practice and procedure applicable to subpoenas issued under this subdivision shall be that of the other jurisdiction, except that:
	(a) the testimony or production shall be only in the county where the person	(a) the testimony or production shall be only in the county where the person

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	resides or is employed, or as otherwise fixed by the grievance administrator for good cause shown; and.	resides or is employed, or as otherwise fixed by the grievance administrator for good cause shown; and.
	(b) compliance with any subpoena issued pursuant to this subdivision and contempt for failure in this respect shall be sought as elsewhere provided in this subchapter.	(b) compliance with any subpoena issued pursuant to this subdivision and contempt for failure in this respect shall be sought as elsewhere provided in this subchapter.
		(E) Access to Medical and Psychological Records.
		(1) After the request for investigation has been served on the respondent, and where there is a genuine issue as to a material fact concerning the physical, mental, or emotional condition of the respondent, the administrator may demand the respondent waive applicable privileges, and permit the administrator access to existing records concerning the physical, mental, or emotional condition of the respondent. The release of information will take place in accordance with MCR 2.314(D).
		(2) Upon the conviction of an attorney, and upon the grievance administrator's request, the court shall release to the grievance administrator a copy of any substance abuse assessments or psychological reports received by the probation department during the criminal action.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
		(3) After the request for investigation has been served on the respondent, and where it appears that the respondent is not fit to engage in the practice of law, the administrator may request the respondent to submit to one or more independent examinations by licensed professionals of the administrator's expense, at the administrator's expense. Where the respondent complies with such a request, the respondent may also be further examined by one or more licensed professionals of the respondent's choosing, at the respondent's expense. (4) When an examination is conducted pursuant to MCR 9.112(E)(2), the licensed professional must provide the administrator and the respondent with copies of the professional's report within 28 days. The report will include a copy of the professional's resume, an account of the history obtained from the respondent, a description of administered tests, and their results, a diagnosis, a prognosis, and recommendations regarding treatment. (5) All records and reports gathered under MCR 9.112(E) are admissible for one year in disciplinary proceedings against the respondent and, after their admission into the record, shall be

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
		retained in camera. (6) When a respondent refuses to comply with a demand by the administrator under MCR 9.112(E)(1) or (2), in a case in which the administrator has initiated formal proceedings, the hearing panel shall review the evidence and all legitimate inferences regarding the relevant physical, mental, or emotional condition of the respondent in the light most favorable to the administrator.
Rule 9.113 Answer by Respondent (A) Answer. Within 21 days after being served with a request for investigation under MCR 9.112(C)(1)(b), the respondent shall file with the administrator a signed, written answer in duplicate fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct. The administrator may allow further time to answer. Misrepresentation in the answer is grounds for discipline. The administrator shall provide a copy of the answer and any supporting documents to the person who filed the request for investigation unless the administrator determines that there is cause for not disclosing some or all of the documents.	**Rule 9.113** Answer by Respondent (A) Answer. Within 21 days after being served with a request for investigation under MCR 9.112(C)(1)(b) or such further time as permitted by the administrator, the respondent shall file with the administrator a ~~signed~~ written answer signed by respondent in duplicate fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct. ~~The administration may allow further time to answer.~~ Misrepresentation in the answer is grounds for discipline. Respondent's signature constitutes verification that he or she has read the document. The administrator shall provide a copy of the answer and any supporting documents to the person who filed the request for investigation unless the administrator determines that there is cause for not	**Rule 9.113** Answer by Respondent (A) Answer. Within 21 days after being served with a request for investigation under MCR 9.112(C)(1)(b), the respondent shall file with the administrator a ~~signed~~ written answer signed by a respondent in duplicate fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct. The administrator may allow further time to answer. Misrepresentation in the answer is grounds for discipline. A respondent's signature constitutes verification that he or she has read the document. The administrator shall provide a copy of the answer and any supporting documents to the person who filed the request for investigation unless the administrator determines that there is cause for not disclosing some or all of the documents.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	disclosing some or all of the documents. The administrator may permit further time to answer the request for investigation.	
(B) Refusal or Failure to Answer.	(B) Refusal or Failure to Answer.	(B) Refusal or Failure to Answer.
(1) A respondent may refuse to answer a request for investigation on expressed constitutional or professional grounds.	(1) A respondent may refuse to answer a request for investigation on expressed constitutional or professional grounds. Such refusal shall not be released except pursuant to MCR 9.126.	(1) A respondent may refuse to answer a request for investigation on expressed constitutional or professional grounds.
(2) The failure of a respondent to answer within the time permitted is misconduct. See MCR 9.104(A)(7).	(2) The failure of a respondent to answer within the time period required under these rules other than as permitted in subrule (B)(1) or as further permitted by the administrator is misconduct. See MCR 9.104(A)(7).	(2) The failure of a respondent to answer within the time required under these rules other than as permitted in subrule (B)(1) or as further permitted by the administrator is misconduct. See MCR 9.104(A)(7).
(3) If a respondent refuses to answer under subrule (B)(1), the refusal may be submitted to a hearing panel for adjudication.	(3) If a respondent refuses to answer under subrule (B)(1), the refusal may be submitted under seal to a hearing panel for adjudication. If a panel finds that the refusal was not proper, it shall direct the attorney to answer the request for investigation within 21 days of its order.	(3) If a respondent refuses to answer under subrule (B)(1), the refusal may be submitted under seal to ~~a hearing panel~~ the board for adjudication. If a panel finds that the refusal was not proper, it shall direct the attorney to answer the request for investigation within 21 days of its order. A panel may order that the respondent's license shall be suspended until further order if he or she does not file an answer to the request for investigation within the 21-day period.
(C) Attorney-Client Privilege. A person	(C) Attorney-Client Privilege. A person	(C) Attorney-Client Privilege. A person

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
who files a request for investigation of an attorney waives any attorney-client privilege that he or she may have as to matters relating to the request for the purposes of the commission's investigation.	who files a request for investigation of an attorney irrevocably waives any attorney-client privilege that he or she may have as to matters relating to the request for the purposes of the commission's investigation. (D) Representation by Attorney. The respondent may be represented by an attorney.	who files a request for investigation of an attorney irrevocably waives any attorney-client privilege that he or she may have as to matters relating to the request for the purposes of the commission's investigation. (D) Representation by Attorney. The respondent may be represented by an attorney.
Rule 9.114 Action by Administrator or Commission After Answer (A) Action After Investigation. After an answer is filed or the time for filing an answer has expired, the administrator may assign the matter for further investigation, including, if necessary, an informal hearing. When the investigation is complete, the administrator shall either (1) dismiss the request for investigation and notify the complainant and the respondent of the reasons for the dismissal, or (2) refer the matter to the commission for its review. The commission may direct that a complaint be filed, that the request be dismissed, or that the respondent be	**Rule 9.114** Action by Administrator or Commission After Answer (A) Action After Investigation. After an answer is filed or the time for filing an answer has expired, the administrator may ~~assign the matter for further investigation, including, if necessary, an informal hearing. When the investigation is complete, the administrator shall either~~ (1) dismiss the request for investigation and notify the complainant and the respondent of the reasons for the dismissal, ~~or~~ (2) conduct further investigation. Upon completion of the investigation, the grievance administrator shall refer the matter to the commission for its review.	**Rule 9.114** Action by Administrator or Commission After Answer (A) Action After Investigation. After an answer is filed or the time for filing an answer has expired, the administrator may ~~assign the matter for further investigation, including, if necessary, an informal hearing. When the investigation is complete, the administrator shall either~~ (1) dismiss the request for investigation and notify the complainant and the respondent of the reasons for the dismissal, or close a file administratively where warranted under the circumstances, or (2) conduct further investigation. Upon completion of the investigation, the grievance administrator shall refer the matter to the commission for its review.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
admonished with the respondent's consent.	The commission may direct that a complaint be filed, that the file be closed ~~request be dismissed~~, ~~or~~ that the respondent be admonished or placed on contractual probation with the respondent's consent, or (3) close a file administratively where warranted under the circumstances. (B) Admonition. With a respondent's consent, a respondent may be admonished by the commission without filing a complaint. An admonition does not constitute discipline and shall be confidential except as provided by this rule, MCR 9.115(J)(3) and by MCR 9.126(D)(4). (1) The administrator shall notify the respondent of the provisions of this rule by ordinary mail at the respondent's address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan, or as otherwise directed by respondent. (2) The respondent may, within 21 days of service of the admonition or such additional time as permitted by the administrator, notify the commission in writing that respondent objects to the admonition. Upon timely receipt of the	The commission may direct that a ~~complaint~~ disciplinary proceedings be filed, that the file be closed or closed with a caution, ~~request be dismissed~~, or that the respondent be admonished or placed on contractual probation with the respondent's consent. (B) Admonition. With the respondent's consent, a respondent may be admonished by the commission without filing a complaint. An admonition does not constitute discipline and shall be confidential except as provided by this rule, MCR 9.115(D)(3) and by MCR 9.126(D)(4). (1) The administrator shall notify the respondent of the provisions of this rule by ordinary mail at the respondent's address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan, or as otherwise directed by respondent. (2) The respondent may, within 21 days of service of the admonition or such additional time as permitted by the administrator, notify the commission in writing that respondent objects to the admonition. Upon timely receipt of the

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	written objection, the commission shall vacate the admonition and either dismiss the request for investigation or authorize the filing of a complaint. Failure of a respondent to object constitutes an acceptance.	written objection, the commission shall vacate the admonition and either dismiss the request for investigation or authorize the filing of a complaint. Failure of a respondent to object constitutes an acceptance. (3) At the time an admonishment becomes effective, if a respondent is known to be employed in a legal capacity by a firm, agency, or other organization, the administrator shall send a copy of the admonishment to the respondent's employer by regular mail. Individual legal clients of the respondent, other than the complainant who initiated the investigation resulting in the admonishment, shall not be provided copies of the admonishment.
(B) Contractual Probation. For purposes of this subrule, "contractual probation" means the placement of a consenting respondent on probation by the commission, without the filing of formal charges. Contractual probation does not constitute discipline, and shall be confidential under MCR 9.126 except as provided by MCR 9.115(J)(3). (1) If the commission finds that the alleged misconduct, if proven, would not result in a substantial suspension or revocation of a respondent's license to	~~(B)~~(C) Contractual Probation. For purposes of this subrule, "contractual probation" means the placement of a consenting respondent on probation by the commission, without the filing of formal charges. Contractual probation does not constitute discipline, and shall be confidential under MCR 9.126 except as provided by MCR 9.115(J)(3). (1) If the commission finds that the alleged misconduct, if proven, would not result in disbarment or a substantial suspension ~~or revocation~~ of a	~~(B)~~(C) Contractual Probation. For purposes of this subrule, "contractual probation" means the placement of a consenting respondent on probation by the commission, without the filing of formal charges. Contractual probation does not constitute discipline, and shall be confidential under MCR 9.126 except as provided by MCR 9.115(J)(3). (1) If the commission finds that the alleged misconduct, if proven, would not result in disbarment or a substantial suspension ~~or revocation~~ of a

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
practice law, the commission may defer disposition of the matter and place the respondent on contractual probation for a period not to exceed two years, provided the following criteria are met:	respondent's license to practice law, the commission may defer disposition of the matter and place the respondent on contractual probation for a period not to exceed two years, provided the following criteria are met.	respondent's license to practice law, the commission may defer disposition of the matter and place the respondent on contractual probation for a period not to exceed two years, provided the following criteria are met.
(a) the misconduct is significantly related to a substance abuse problem of the respondent.	(a) the misconduct is significantly related to ~~a substance abuse problem of the respondent~~, a respondent's mental or physical infirmity or disability, or addiction to drugs or intoxicants.	(a) the misconduct is significantly related to a respondent's substance abuse problem, ~~of the respondent~~, or mental or physical infirmity or disability,
(b) the terms and conditions of the contractual probation, which shall include an appropriate period of treatment, are agreed upon by the grievance administrator and the respondent prior to submission to the commission for consideration; and	(b) the terms and conditions of the contractual probation, which shall include an appropriate period of treatment, are agreed upon by the commission ~~, the grievance administrator~~ and the respondent ~~prior to submission to the commission for consideration~~, and,	(b) the terms and conditions of the contractual probation, which shall include an appropriate period of treatment, are agreed upon by the commission ~~, the grievance administrator~~ and the respondent ~~prior to submission to the commission for consideration~~, and,
(c) the commission determines that contractual probation is appropriate and in the best interests of the public, the courts, the legal profession, and the respondent.	(c) the commission determines that contractual probation is appropriate and in the best interests of the public, the courts, the legal profession, and the respondent. (2) A contractual probation may include one or more of these requirements: (a) Periodic alcohol or drug testing. (b) Attendance at support-group or comparable meetings.	(c) the commission determines that contractual probation is appropriate and in the best interests of the public, the courts, the legal profession, and the respondent. (2) A contractual probation may include one or more of these requirements: (a) Periodic alcohol or drug testing. (b) Attendance at support-group or comparable meetings.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	(c) Professional counseling on a regular basis.	(c) Professional counseling on a regular basis.
	(d) An initial written diagnosis and prognosis by the provider followed by quarterly verification of treatment by the provider as agreed upon by the commission and the respondent. The provider shall notify the commission of any failure to adhere to the treatment plan.	(d) An initial written diagnosis and prognosis by the provider followed by quarterly verification of treatment by the provider as agreed upon by the commission and the respondent. The provider shall notify the commission of any failure to adhere to the treatment plan.
(2) The respondent is responsible for any costs associated with the contractual probation and related treatment.	(~~2~~3) The respondent is responsible for any costs associated with the contractual probation and related treatment.	(~~2~~3) The respondent is responsible for any costs associated with the contractual probation and related treatment.
(3) Upon written notice to the respondent and an opportunity to file written objections, the commission may terminate the contractual probation and file a formal complaint or take other appropriate action based on the misconduct, if	(~~3~~4) Upon written notice to the respondent and an opportunity to file written objections, the commission may terminate the contractual probation and file a formal ~~complaint~~ disciplinary proceedings or take other appropriate action based on the misconduct, if	(~~3~~4) Upon written notice to the respondent and an opportunity to file written objections, the commission may terminate the contractual probation and file a ~~formal complaint~~ disciplinary proceedings or take other appropriate action based on the misconduct, if
(a) the respondent fails to satisfactorily complete the terms and conditions of the contractual probation, or	(a) the respondent fails to satisfactorily complete the terms and conditions of the contractual probation, or	(a) the respondent fails to satisfactorily complete the terms and conditions of the contractual probation, or
(b) the commission concludes that the respondent has committed other misconduct that warrants the filing of a formal complaint.	(b) the commission concludes that the respondent has committed other misconduct that warrants the filing of a formal complaint.	(b) the commission concludes that the respondent has committed other misconduct that warrants the filing of a formal complaint.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(4) The placing of a respondent on contractual probation shall constitute a final disposition that entitles the complainant to notice in accordance with MCR 9.114(D), and to file an action in accordance with MCR 9.122(A)(2).	~~(4)~~(5) The placing of a respondent on contractual probation shall constitute a final disposition that entitles the complainant to notice in accordance with MCR 9.114(D), and to file an action in accordance with MCR 9.122(A)(2).	~~(4)~~(5) The placing of a respondent on contractual probation shall constitute a final disposition that entitles the complainant to notice in accordance with MCR 9.114(D), and to file an action in accordance with MCR 9.122(A)(2).
(C) Assistance of Law Enforcement Agencies. The administrator may request a law enforcement office to assist in an investigation by furnishing all available information about the respondent. Law enforcement officers are requested to comply promptly with each request.	~~(C)~~(D) Assistance of Law Enforcement Agencies. The administrator may request a law enforcement office to assist in an investigation by furnishing all available information about the respondent. Law enforcement officers are requested to comply promptly with each request.	~~(C)~~(D) Assistance of Law Enforcement Agencies. The administrator may request a law enforcement office to assist in an investigation by furnishing all available information about the respondent. Law enforcement officers are requested to comply promptly with each request.
	(E) Assistance of Courts. If the grievance administrator determines that a non-public court file exists, including files on expunged convictions, and that it is relevant to a pending investigation concerning a respondent attorney, the administrator may request that a court release to the Attorney Grievance Commission the nonpublic court file. Courts are requested to comply promptly with each request.	(E) Assistance of Courts. If the grievance administrator determines that a non-public court file exists, including files on expunged convictions, and that it is relevant to a pending investigation concerning a respondent attorney, the administrator may request that a court release to the Attorney Grievance Commission the nonpublic court file. Courts are requested to comply promptly with each request.
(D) Report by Administrator. The administrator shall inform the complainant and, if the respondent answered, the respondent, of the final disposition of every request for investigation dismissed by the commission without a hearing before a hearing panel.	~~(D)~~(E) Report by Administrator. The administrator shall inform the complainant and, if the respondent answered, the respondent, of the final disposition of every request for investigation ~~dismissed by the commission without a hearing before a~~	~~(D)~~(E) Report by Administrator. The administrator shall inform the complainant and, if the respondent answered, the respondent, of the final disposition of every request for investigation ~~dismissed by the commission without a hearing before a~~

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	~~hearing panel~~.	~~hearing panel~~.
(E) Retention of Records. All files and records relating to allegations of misconduct by an attorney must be retained by the commission for the lifetime of the attorney, except as follows:	~~(F)~~(G) Retention of Records. All files and records relating to allegations of misconduct by an attorney must be retained by the commission for the lifetime of the attorney, except as follows:	~~(F)~~(G) Retention of Records. All files and records relating to allegations of misconduct by an attorney must be retained by the commission for the lifetime of the attorney, except as follows:
	(1) Where 3 years have passed from the conclusion of formal disciplinary action or the issuance of an admonishment, non-essential documents may be discarded.	(1) Where 3 years have passed from the conclusion of formal disciplinary action or the issuance of an admonishment, non-essential documents may be discarded.
(1) The administrator may destroy the files or records relating to a request for investigation dismissed by the commission after 3 years have elapsed from the date of dismissal.	(2) The administrator may destroy the files or records relating to a closed request for investigation ~~dismissed by the commission~~ after 3 years have elapsed from the date of ~~dismissal~~ closing.	(2) The administrator may destroy the files or records relating to a closed or dismissed request for investigation ~~dismissed by the commission~~ after 3 years have elapsed from the date of dismissal or closing.
(2) If no request for investigation was pending when the files or records were created or acquired, and no related request for investigation was filed subsequently, the administrator may destroy the files or records after 3 years have elapsed from the date when they were created or acquired by the commission.	~~(2)~~(3) If no request for investigation was pending when the files or records were created or acquired, and no related request for investigation was filed subsequently, the administrator may destroy the files or records after ~~3 years have~~ 1 year has elapsed from the date when they were created or acquired by the commission.	~~(2)~~(3) If no request for investigation was pending when the files or records were created or acquired, and no related request for investigation was filed subsequently, the administrator may destroy the files or records after ~~3 years have~~ 1 year has elapsed from the date when they were created or acquired by the commission.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
Rule 9.115 Hearing Panel Procedure	**Rule 9.115** Hearing Panel Procedure	**Rule 9.115** Hearing Panel Procedure
(A) Rules Applicable. Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel. Pleadings must conform as nearly as practicable to the requirements of subchapter 2.100. The original of the formal complaint and all other pleadings must be filed with the board. The formal complaint must be served on the respondent. All other pleadings must be served on the opposing party and each member of the hearing panel. Proof of service of the formal complaint may be filed at any time prior to the date of the hearing. Proof of service of all other pleadings must be filed with the original pleadings.	(A) Rules Applicable. Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel. Pleadings must conform as nearly as practicable to the requirements of subchapter 2.100. The original of the formal complaint and all other pleadings must be filed with the board. The formal complaint must be served on the respondent. All other pleadings must be served on the opposing party and each member of the hearing panel. Proof of service of the formal complaint may be filed at any time prior to the date of the hearing. Proof of service of all other pleadings must be filed with the original pleadings.	(A) Rules Applicable. Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel. Pleadings must conform as nearly as practicable to the requirements of subchapter 2.100. The original of the formal complaint and all other pleadings must be filed with the board. The formal complaint must be served on the respondent. All other pleadings must be served on the opposing party and each member of the hearing panel. Proof of service of the formal complaint may be filed at any time prior to the date of the hearing. Proof of service of all other pleadings must be filed with the original pleadings.
(B) Complaint. Except as provided by MCR 9.120, a complaint setting forth the facts of the alleged misconduct begins proceedings before a hearing panel. The administrator shall prepare the complaint, file it with the board, and serve it on the respondent and, if the respondent is a member of or is associated with a law firm, on the firm. The unwillingness of a complainant to prosecute, or a settlement between the complainant and the respondent, does not itself affect the right	(B) Complaint. Except as provided by MCR 9.120, a complaint setting forth the facts of the alleged misconduct begins proceedings before a hearing panel. The administrator shall prepare the complaint, file it with the board, and serve it on the respondent and, ~~if the~~ respondent's employer ~~is a member of or is associated with a law firm, on the firm~~. The unwillingness of a complainant to proceed ~~prosecute~~, or a settlement between the complainant and the respondent, does not	(B) Complaint. Except as provided by MCR 9.120, a complaint setting forth the facts of the alleged misconduct begins proceedings before a hearing panel. The administrator shall prepare the complaint, file it with the board, and serve it on the respondent and, ~~if the~~ respondent's employer ~~is a member of or is associated with a law firm, on the firm~~. The unwillingness of a complainant to proceed ~~prosecute~~, or a settlement between the complainant and the

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
of the administrator to proceed.	itself affect the right of the administrator to proceed.	respondent, does not itself affect the right of the administrator to proceed.
(C) Service. Service of the complaint and all subsequent pleadings and orders must be made by personal service or by registered or certified mail addressed to the person at the person's last known address. An attorney's last known address is the address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. A respondent's attorney of record must also be served, but service may be made under MCR 2.107. Service is effective at the time of mailing, and nondelivery does not affect the validity of the service.	(C) Service. Service of the complaint ~~and all subsequent pleadings and orders~~ and a default must be made by personal service or by registered or certified mail addressed to the person at the person's last known address. An attorney's last known address is the address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. A respondent's attorney of record must also be served, but service may be made under MCR 2.107. Service is effective at the time of mailing, and nondelivery does not affect the validity of the service.	(C) Service. Service of the complaint ~~and all subsequent pleadings and orders~~ and a default must be made by personal service or by registered or certified mail addressed to the person at the person's last known address. An attorney's last known address is the address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. A respondent's attorney of record must also be served, but service may be made under MCR 2.107. Service is effective at the time of mailing, and nondelivery does not affect the validity of the service.
(D) Answer.	(D) Answer.	(D) Answer.
(1) Within 21 days after the complaint is served, the respondent shall file and serve a signed answer as provided in subrule (A).	(1) ~~Within 21 days after the complaint is served, the respondent shall file and serve a signed answer as provided in subrule (A).~~ A respondent must serve and file a signed answer or take other action permitted by law or these rules within 21 days after being served with the complaint in the manner provided in MCR 9.115(C). A signature constitutes verification that the respondent has read the answer or other response.	(1) ~~Within 21 days after the complaint is served, the respondent shall file and serve a signed answer as provided in subrule (A).~~ A respondent must serve and file a signed answer or take other action permitted by law or these rules within 21 days after being served with the complaint in the manner provided in MCR 9.115(C). A signature constitutes verification that the respondent has read the answer or other response.
(2) A default, with the same effect as a	(2) A default, with the same effect as a	(2) A default, with the same effect as a

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
default in a civil action, may enter against a respondent who fails within the time permitted to file an answer admitting, denying, or explaining the complaint, or asserting the grounds for failing to do so.	default in a civil action, may enter against a respondent who fails within the time permitted to file an answer admitting, denying, or explaining the complaint, or asserting the grounds for failing to do so.	default in a civil action, may enter against a respondent who fails within the time permitted to file an answer admitting, denying, or explaining the complaint, or asserting the grounds for failing to do so.
(E) Representation by Attorney. The respondent may be represented by an attorney, who must enter an appearance.	(E) Representation by an Attorney. The respondent may be represented by an attorney, who must enter an appearance, which has the same effect as an appearance under MCR 2.117.	(E) Representation by an Attorney. The respondent may be represented by an attorney, who must enter an appearance, which has the same effect as an appearance under MCR 2.117.
(F) Prehearing Procedure.	(F) Prehearing Procedure.	(F) Prehearing Procedure.
(1) Extensions. If good cause is shown, the hearing panel chairperson may grant one extension of time per party for filing pleadings and may grant one adjournment per party. Additional requests may be granted by the board chairperson if good cause is shown. Pending criminal or civil litigation of substantial similarity to the allegations of the complaint is not necessarily grounds for an adjournment.	(1) Extensions. If good cause is shown, the hearing panel chairperson may grant one extension of time per party for filing pleadings and may grant one adjournment per party. Additional requests may be granted by the board chairperson if good cause is shown. Pending criminal or civil litigation of substantial similarity to the allegations of the complaint is not necessarily grounds for an adjournment.	(1) Extensions. If good cause is shown, the hearing panel chairperson may grant one extension of time per party for filing pleadings and may grant one adjournment per party. Additional requests may be granted by the board chairperson if good cause is shown. Pending criminal or civil litigation of substantial similarity to the allegations of the complaint is not necessarily grounds for an adjournment.
(2) Motion to Disqualify.	(2) Motion to Disqualify.	(2) Motion to Disqualify.
(a) Within 14 days after an answer has been filed or the time for filing the answer has expired, each member of the hearing panel shall disclose in a writing filed with the board any information that the member	(a) Within 14 days after an answer has been filed or the time for filing the answer has expired, each member of the hearing panel shall disclose in a writing filed with the board any information that the	(a) Within 14 days after an answer has been filed or the time for filing the answer has expired, each member of the hearing panel shall disclose in a writing filed with the board any information that

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
believes could be grounds for disqualification under the guidelines of MCR 2.003(B). The duty to disclose shall be a continuing one. The board shall serve a copy of the disclosure on each party.	member believes could be grounds for disqualification under the guidelines of MCR 2.003(B). The duty to disclose shall be a continuing one. The board shall serve a copy of the disclosure on each party and each panel member.	the member believes could be grounds for disqualification under the guidelines of MCR 2.003(B), including pending requests for investigation filed against the member, and admonishments or contractual probations issued within the preceding 7 years. The duty to disclose shall be a continuing one. The board shall serve a copy of the disclosure on each party and each panel member.
(b) Within 14 days after the board serves a copy of a written disclosure, the respondent or the administrator may move to disqualify a member of the hearing panel. The board chairperson shall decide the motion under the guidelines of MCR 2.003.	(b) ~~Within 14 days after the board serves a copy of a written disclosure, the respondent or the administrator may move to disqualify a member of the hearing panel.~~ A motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the hearing date, the motion must be made forthwith. If a motion is not timely filed, untimeliness is a factor in deciding whether the motion should be granted. All known grounds for disqualification must be included at the time the motion is filed. An affidavit must accompany the motion. The board chairperson shall decide the motion under the guidelines of MCR 2.003.	(b) ~~Within 14 days after the board serves a copy of a written disclosure, the respondent or the administrator may move to disqualify a member of the hearing panel.~~ A motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the hearing date, the motion must be made forthwith. If a motion is not timely filed, untimeliness is a factor in deciding whether the motion should be granted. All known grounds for disqualification must be included at the time the motion is filed. An affidavit must accompany the motion. The board chairperson shall decide the motion under the guidelines of MCR 2.003.
(c) The board must assign a substitute for a disqualified member of a hearing panel. If all are disqualified, the board must reassign the complaint to another panel.	(c) The board must assign a substitute for a disqualified member of a hearing panel. If all are disqualified, the board must reassign the complaint to another panel.	(c) The board must assign a substitute for a disqualified member of a hearing panel. If all are disqualified, the board must reassign the complaint to another panel.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(3) Amendment of Pleadings. The administrator and the respondent each may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by the opposing party, or within 15 days after serving the pleading if it does not require a responsive pleading. Otherwise, a party may amend a pleading only by leave granted by the hearing panel chairperson or with the written consent of the adverse party.	(3) Amendment of Pleadings. The administrator and the respondent each may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by the opposing party, or within 15 days after serving the pleading if it does not require a responsive pleading. Otherwise, a party may amend a pleading only by leave granted by the hearing panel chairperson or with the written consent of the adverse party.	(3) Amendment of Pleadings. The administrator and the respondent each may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by the opposing party, or within 15 days after serving the pleading if it does not require a responsive pleading. Otherwise, a party may amend a pleading only by leave granted by the hearing panel chairperson or with the written consent of the adverse party.
(4) Discovery. Pretrial or discovery proceedings are not permitted, except as follows:	(4) Discovery. Pretrial or discovery proceedings are not permitted, except as follows:	(4) Discovery. Pretrial or discovery proceedings are not permitted, except as follows:
(a) Within 21 days of the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection or copying. Within 14 days after service of a written demand, the documents shall be made available, provided that the administrator need not comply prior to the filing of the respondent's answer; in such case, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer. The respondent shall comply with the written demand within 14 days, except that the	(a) Within 21 days of the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection or copying. Within 14 days after service of a written demand, the documents shall be made available, provided that the administrator need not comply prior to the filing of the respondent's answer; in such case, the administrator shall comply with the written demand within 14 days ~~of~~ after the filing of the respondent's answer. The respondent shall comply with the written demand within 14 days, except that the	(a) Within 21 days of the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection or copying. Within 14 days after service of a written demand, the documents shall be made available, provided that the administrator need not comply prior to the filing of the respondent's answer; in such case, the administrator shall comply with the written demand within 14 days ~~of~~ after the filing of the respondent's answer. The respondent shall comply with the written demand within 14 days, except that the

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
respondent need not comply until the time for filing an answer to the formal complaint has expired. Any other documentary evidence to be introduced at the hearing by either party shall be supplied to the other party no later than 14 days prior to the hearing. Any documentary evidence not so supplied shall be excluded from the hearing except for good cause shown.	respondent need not comply until the time for filing an answer to the formal complaint has expired. Any other documentary evidence to be introduced at the hearing by either party shall be supplied to the other party no later than 14 days prior to the hearing. Any documentary evidence not so supplied shall be excluded from the hearing except for good cause shown.	respondent need not comply until the time for filing an answer to the formal complaint has expired. Any other documentary evidence to be introduced at the hearing by either party shall be supplied to the other party no later than 14 days prior to the hearing. Any documentary evidence not so supplied shall be excluded from the hearing except for good cause shown.
(b) Within 21 days of the service of a formal complaint, a party may demand in writing that the opposing party supply written notification of the name and address of any person to be called as a witness. Within 14 days after the service of a written demand, the notification shall be supplied. However, the administrator need not comply prior to the filing of the respondent's answer to the formal complaint; in such cases, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer to the formal complaint. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Except for good cause shown, a party who is required to give said notification must give supplemental notice to the adverse party within 7 days after any additional	(b)(1)Within 21 days ~~of~~ after the service of a formal complaint, a party may demand in writing that the opposing party supply written notification of the name and address of any person to be called as a witness at the hearing. Within 14 days after the service of a written demand, the notification shall be supplied. However, the administrator need not comply prior to the filing of the respondent's answer to the formal complaint; in such cases, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer to the formal complaint. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Except for good cause shown, a party who is required to give said notification must give supplemental notice to the adverse party within 7 days after any additional	(b)(1)Within 21 days ~~of~~ after the service of a formal complaint, a party may demand in writing that the opposing party supply written notification of the name and address of any person to be called as a witness at the hearing. Within 14 days after the service of a written demand, the notification shall be supplied. However, the administrator need not comply prior to the filing of the respondent's answer to the formal complaint; in such cases, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer to the formal complaint. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Except for good cause shown, a party who is required to give said notification must give supplemental

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
witness has been identified, and must give the supplemental notice immediately if the additional witness is identified less than 14 days before a scheduled hearing.	witness has been identified, and must give the supplemental notice immediately if the additional witness is identified less than 14 days before a scheduled hearing. (ii) Within 21 days following the filing of an answer, the administrator and respondent shall exchange the names and addresses of all persons having knowledge of relevant facts and comply with reasonable requests for (1) non-privileged information and evidence relevant to the charges of the respondent, and (2) other material upon good cause shown to the chair of the hearing panel.	notice to the adverse party within 7 days after any additional witness has been identified, and must give the supplemental notice immediately if the additional witness is identified less than 14 days before a scheduled hearing.
Upon receipt of a demand made pursuant to this rule, a party must also provide to the other party any statements given by witnesses to be called at the hearing. Witness statements include stenographic, recorded, or written statements of witnesses provided to the administrator, the respondent, or the respondent's representative. The term "written statement" does not include notes or memoranda prepared by a party or a party's representative of conversations with witnesses, or other privileged information.	~~Upon receipt of a demand made pursuant to this rule, a party must also provide to the other party any statements given by witnesses to be called at the hearing. Witness statements include stenographic, recorded, or written statements of witnesses provided to the administrator, the respondent, or the respondent's representative. The term "written statement" does not include notes or memoranda prepared by a party or a party's representative of conversations with witnesses, or other privileged information.~~	(ii) Upon receipt of a demand made pursuant to this rule, a party must also provide to the other party any statements given by witnesses to be called at the hearing. Witness statements include stenographic, recorded, or written statements of witnesses provided to the administrator, the respondent, or the respondent's representative. The term "written statement" does not include notes or memoranda prepared by a party or a party's representative of conversations with witnesses, or other privileged information.
(c) A deposition may be taken of a witness who lives outside the state or is physically unable to attend the hearing. For good	(c) A deposition may be taken of a witness who lives outside the state or is physically unable to attend the hearing.	(c) A deposition may be taken of a witness who lives outside the state or is physically unable to attend the hearing.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
cause shown, the hearing panel may allow the parties to depose other witnesses.	For good cause shown, the hearing panel may allow the parties to depose other witnesses.	For good cause shown, the hearing panel may allow the parties to depose other witnesses.
(d) The hearing panel may order a prehearing conference held before a panel member to obtain admissions or otherwise narrow the issues presented by the pleadings.	(d) The hearing panel may order a prehearing conference held before a panel member to obtain admissions or otherwise narrow the issues presented by the pleadings.	(d) The hearing panel may order a prehearing conference held before a panel member to obtain admissions or otherwise narrow the issues presented by the pleadings.
If a party fails to comply with subrule (F)(4)(a) or (b), the hearing panel or the board may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).	If a party fails to comply with subrule (F)(4)(a) or (b), the hearing panel or the board may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).	If a party fails to comply with subrule (F)(4)(a) or (b), the hearing panel or the board may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).
(5) Discipline by Consent. A respondent may offer to plead nolo contendere or to admit all essential facts contained in the complaint or any of its allegations in exchange for a stated form of discipline and on the condition that the plea or admission and discipline agreed on is accepted by the commission and the hearing panel. The respondent's offer shall first be submitted to the commission. If the offer is accepted by the commission, the administrator and the respondent shall prepare a stipulation for a consent order of discipline and file the stipulation with the hearing panel. At the time of the filing, the administrator shall serve a copy of the	(5) Discipline by Consent. A respondent may offer to plead ~~nolo contendere~~ no contest or to admit all essential facts contained in the complaint or any of its allegations in exchange for a stated form of discipline and on the condition that the plea or admission and discipline agreed on is accepted by the commission and the hearing panel. The respondent's offer shall first be submitted to the commission. If the offer is accepted by the commission, the administrator and the respondent shall prepare a stipulation for a consent order of discipline that includes all prior discipline, admonishments, and contractual probations, if any, and file the stipulation	(5) Discipline by Consent. A respondent may offer to plead ~~nolo contendere~~ no contest or to admit all essential facts contained in the complaint or any of its allegations in exchange for a stated form of discipline and on the condition that the plea or admission and discipline agreed on is accepted by the commission and the hearing panel. The respondent's offer shall first be submitted to the commission. If the offer is accepted by the commission, the administrator and the respondent shall prepare a stipulation for a consent order of discipline that includes all prior discipline, admonishments, and contractual

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
proposed stipulation upon the complainant. If the hearing panel approves the stipulation, it shall enter a final order of discipline. If not approved, the offer is deemed withdrawn and statements or stipulations made in connection with the offer are inadmissible in disciplinary proceedings against the respondent and not binding on the respondent or the administrator. If the stipulation is not approved, the matter must then be referred for hearing to a hearing panel other than the one that passed on the proposed discipline. (G) Hearing Time and Place; Notice. The board or the chairperson of the hearing panel shall set the time and place for a hearing. Notice of a hearing must be served by the board or the chairperson of the hearing panel on the administrator, the respondent, the complainant, and any attorney of record at least 21 days before the initial hearing. Unless the board or the chairperson of the hearing panel otherwise directs, the hearing must be in the county in which the respondent has or last had an office or residence. If the hearing panel fails to convene or complete its hearing	with the hearing panel. If the stipulation contains any nonpublic information, it shall be filed in camera. ~~At the time of the filing, the administrator shall serve a copy of the proposed stipulation upon the complainant.~~ If the hearing panel approves the stipulation, it shall enter a final order of discipline. If not approved, the offer is deemed withdrawn and statements or stipulations made in connection with the offer are inadmissible in disciplinary proceedings against the respondent and not binding on the respondent or the administrator. If the stipulation is not approved, the matter must then be referred for hearing to a hearing panel other than the one that passed on the proposed discipline. (G) Hearing Time and Place; Notice. The board or the chairperson of the hearing panel shall set the time and place for a hearing. Notice of a hearing must be served by the board or the chairperson of the hearing panel on the administrator, the respondent, the complainant, and any attorney of record at least 21 days before the initial hearing. Unless the board or the chairperson of the hearing panel otherwise directs, the hearing must be in the county in which the respondent has or last had an office or residence. If the hearing panel fails to convene or complete its hearing	probations, if any, and file the stipulation with the hearing panel. If the stipulation contains any nonpublic information, it shall be filed in camera. ~~At the time of the filing, the administrator shall serve a copy of the proposed stipulation upon the complainant.~~ If the hearing panel approves the stipulation, it shall enter a final order of discipline. If not approved, the offer is deemed withdrawn and statements or stipulations made in connection with the offer are inadmissible in disciplinary proceedings against the respondent and not binding on the respondent or the administrator. If the stipulation is not approved, the matter must then be referred for hearing to a hearing panel other than the one that passed on the proposed discipline. (G) Hearing Time and Place; Notice. The board or the chairperson of the hearing panel shall set the time and place for a hearing. Notice of a hearing must be served by the board or the chairperson of the hearing panel on the administrator, the respondent, the complainant, and any attorney of record at least 21 days before the initial hearing. Unless the board or the chairperson of the hearing panel otherwise directs, the hearing must be in the county in which the respondent has or last had an office or residence. If the hearing panel fails to convene or

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
within a reasonable time, the board may reassign the complaint to another panel or to a master. A party may file a motion for a change of venue. The motion must be filed with the board and shall be decided by the board chairperson, in part, on the basis of the guidelines in MCR 2.221.	within a reasonable time, the board may reassign the complaint to another panel or to a master. A party may file a motion for a change of venue. The motion must be filed with the board and shall be decided by the board chairperson, in part, on the basis of the guidelines in MCR 2.221. Notwithstanding MRE 615, there shall be a presumption that a complainant is entitled to be present during a hearing, which may only be overcome upon a finding by the panel, supported by facts which are particular to the proceeding, that testimony by the complainant is likely to be materially affected by exposure to other testimony at the hearing.	complete its hearing within a reasonable time, the board may reassign the complaint to another panel or to a master. A party may file a motion for a change of venue. The motion must be filed with the board and shall be decided by the board chairperson, in part, on the basis of the guidelines in MCR 2.221. Notwithstanding MRE 615, there shall be a presumption that a complainant is entitled to be present during a hearing, which may only be overcome upon a finding by the panel, supported by facts which are particular to the proceeding, that testimony by the complainant is likely to be materially affected by exposure to other testimony at the hearing.
(H) Respondent's Appearance. The respondent shall personally appear at the hearing and is subject to cross-examination as an opposite party under MCL 600.2161.	(H) Respondent's Appearance. The respondent shall personally appear at the hearing, unless excused by the panel, and is subject to cross-examination as an opposite party under MCL 600.2161. (1) Where satisfactory proofs are entered into the record that a respondent possessed actual notice of the proceedings, but who still fails to appear, a panel shall suspend him or her effective 7 days from the date of entry of the order and until further order of the panel or the board.	(H) Respondent's Appearance. The respondent shall personally appear at the hearing, unless excused by the panel for good cause shown, and is subject to cross-examination as an opposite party under MCL 600.2161. (1) Where satisfactory proofs are entered into the record that a respondent possessed actual notice of the proceedings, but who still fails to appear, a panel shall suspend him or her effective 7 days from the date of entry of the order and until further order of the panel or the board.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
If the respondent, or the respondent's attorney on his or her behalf, claims physical or mental incapacity as a reason for the respondent's failure to appear before a hearing panel or the board, the panel or the board on its own initiative may suspend the respondent from the practice of law until further order of the panel or board. The order of suspension must be filed and served as other orders of discipline.	(2) If the respondent, or the respondent's attorney on his or her behalf, claims physical or mental incapacity as a reason for the respondent's failure to appear before a hearing panel or the board, the panel or the board on its own initiative may effective immediately, suspend the respondent from the practice of law and until further order of the panel or board. The order of suspension must be filed and served as other orders of discipline.	(2) If the respondent, or the respondent's attorney on his or her behalf, claims physical or mental incapacity as a reason for the respondent's failure to appear before a hearing panel or the board, the panel or the board on its own initiative may effective immediately, suspend the respondent from the practice of law and until further order of the panel or board. The order of suspension must be filed and served as other orders of discipline.
(I) Hearing; Contempt.	(I) Hearing; Contempt.	(I) Hearing; Contempt.
(1) A hearing panel may issue subpoenas (including subpoenas for production of documents and other tangible things), cause testimony to be taken under oath, and rule on the admissibility of evidence under the Michigan Rules of Evidence. The oath or affirmation may be administered by a panel member. A subpoena must be issued in the name and under the seal of the board. It must be signed by a panel or board member, by the administrator, or by the respondent or the respondent's attorney. A subpoenaed witness must be paid the same fee and mileage as a witness subpoenaed to testify in the circuit court. Parties must notify their own witnesses of the date, time, and place of the hearing.	(1) A hearing panel may issue subpoenas (including subpoenas for production of documents and other tangible things), cause testimony to be taken under oath, and rule on the admissibility of evidence under the Michigan Rules of Evidence. The oath or affirmation may be administered by a panel member. A subpoena must be issued in the name and under the seal of the board. It must be signed by a panel or board member, by the administrator, or by the respondent or the respondent's attorney. A subpoenaed witness must be paid the same fee and mileage as a witness subpoenaed to testify in the circuit court. Parties must notify their own witnesses of the date, time, and place of the hearing.	(1) A hearing panel may issue subpoenas (including subpoenas for production of documents and other tangible things), cause testimony to be taken under oath, and rule on the admissibility of evidence under the Michigan Rules of Evidence. The oath or affirmation may be administered by a panel member. A subpoena must be issued in the name and under the seal of the board. It must be signed by a panel or board member, by the administrator, or by the respondent or the respondent's attorney. A subpoenaed witness must be paid the same fee and mileage as a witness subpoenaed to testify in the circuit court. Parties must notify their own witnesses of the date, time, and place of the hearing.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(2) A person who without just cause fails or refuses to appear and give evidence as commanded by a subpoena, to be sworn or affirmed, or to answer a proper question after he or she has been ordered to do so, is in contempt. The administrator may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.	(2) A person who without just cause fails or refuses to appear and give evidence as commanded by a subpoena, to be sworn or affirmed, or to answer a proper question after he or she has been ordered to do so, is in contempt. The administrator may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred. (3) Upon a showing of good cause by a party, a panel may permit a witness to testify by telephonic, voice, or video conferencing.	(2) A person who without just cause fails or refuses to appear and give evidence as commanded by a subpoena, to be sworn or affirmed, or to answer a proper question after he or she has been ordered to do so, is in contempt. The administrator may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred. (3) Upon a showing of good cause by a party, a panel may permit a witness to testify by telephonic, voice, or video conferencing.
(J) Decision.	(J) Decision.	(J) Decision.
(1) The hearing panel must file a report on its decisions regarding the misconduct charges and, if applicable, the resulting discipline. The report must include a certified transcript, a summary of the evidence, pleadings, exhibits and briefs, and findings of fact. The discipline section of the report must also include a summary of all previous misconduct for which the respondent was disciplined or admonished. (2) Upon a finding of misconduct, the hearing panel shall conduct a separate hearing to determine the appropriate	(1) The hearing panel must file a report on its decisions regarding the misconduct charges and, if applicable, the resulting discipline. The report must include a certified transcript, a summary of the evidence, pleadings, exhibits and briefs, and findings of fact. The discipline section of the report must also include a summary of all previous misconduct for which the respondent was disciplined, ~~or~~ admonished, or placed on contractual probation. (2) Upon a finding of misconduct, the hearing panel shall conduct a separate sanction hearing to determine the	(1) The hearing panel must file a report on its decisions regarding the misconduct charges and, if applicable, the resulting discipline. The report must include a certified transcript, a summary of the evidence, pleadings, exhibits and briefs, and findings of fact. The discipline section of the report must also include a summary of all previous misconduct for which the respondent was disciplined, ~~or~~ admonished, or placed on contractual probation. (2) Upon a finding of misconduct, the hearing panel shall conduct a separate hearing to determine the appropriate

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
discipline. The hearing on discipline shall be conducted as soon after the finding of misconduct as is practicable and may be held immediately following the panel's ruling that misconduct has been established. (3) If the hearing panel finds that the charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline. The order shall take effect 21 days after it is served on the respondent unless the panel finds good cause for the order to take effect on a different date, in which event the panel's decision must explain the reasons for ordering a different effective date. In determining the discipline to be imposed, any and all relevant evidence of aggravation or mitigation shall be admissible, including previous admonitions and orders of discipline, and the previous placement of the respondent on contractual probation. (4) If the hearing panel finds that the charge of misconduct is not established by a preponderance of the evidence, it must enter an order dismissing the complaint.	appropriate discipline. The sanction hearing ~~on discipline~~ shall be conducted as soon after the finding of misconduct as is practicable and may be held immediately following the panel's ruling that misconduct has been established. (3) If the hearing panel finds that the charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline. The order shall take effect 21 days after it is served on the respondent unless the panel finds good cause for the order to take effect on a different date, in which event the panel's decision must explain the reasons for ordering a different effective date. The discipline ordered may be concurrent or consecutive to other discipline. In determining the discipline to be imposed, any and all relevant evidence of aggravation or mitigation shall be admissible, including, but not limited to, records of the board ~~previous admonitions and orders of discipline~~, and the previous placement of the respondent on contractual probation. (4) If the hearing panel finds that the charge of misconduct is not established by a preponderance of the evidence, it must enter an order dismissing the complaint.	discipline. The hearing on discipline shall be conducted as soon after the finding of misconduct as is practicable and may be held immediately following the panel's ruling that misconduct has been established. (3) If the hearing panel finds that the charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline. The order shall take effect 21 days after it is served on the respondent unless the panel finds good cause for the order to take effect on a different date, in which event the panel's decision must explain the reasons for ordering a different effective date. The discipline ordered may be concurrent or consecutive to other discipline. In determining the discipline to be imposed, any and all relevant evidence of aggravation or mitigation shall be admissible, including, but not limited to, records of the board, previous admonitions ~~and orders of discipline~~, and the previous placement of the respondent on contractual probation. (4) If the hearing panel finds that the charge of misconduct is not established by a preponderance of the evidence, it must enter an order dismissing the complaint.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(5) The report and order must be signed by the panel chairperson and filed with the board and the administrator. A copy must be served on the parties as required by these rules.	(5) The report and order must be signed by the panel chairperson and filed with the board and the administrator. A copy must be served on the parties as required by these rules.	(5) The report and order must be signed by the panel chairperson and filed with the board and the administrator. A copy must be served on the parties as required by these rules.
(K) Stay of Discipline. If a discipline order is a suspension of 179 days or less, a stay of the discipline order will automatically issue on the timely filing by the respondent of a petition for review and a petition for a stay of the discipline. If the discipline ordered is more severe than a suspension of 179 days, the respondent may petition the board for a stay pending review of the discipline order. Once granted, a stay remains effective until the further order of the board.	(K) Stay of Discipline. If a discipline order is a suspension of 179 days or less, a stay of the discipline order will automatically issue on the timely filing by the respondent of a petition for review and a petition for a stay of the discipline. If the discipline ordered is more severe than a suspension of 179 days, the respondent may petition the board for a stay pending review of the discipline order. Once granted, a stay remains effective until the further order of the board.	(K) Stay of Discipline. If a discipline order is a suspension of 179 days or less, a stay of the discipline order will automatically issue on the timely filing by the respondent of a petition for review and a petition for a stay of the discipline. If the discipline ordered is more severe than a suspension of 179 days, the respondent may petition the board for a stay pending review of the discipline order. Once granted, a stay remains effective until the further order of the board.
(L) Enforcement. The administrator shall take the necessary steps to enforce a discipline order after it is effective.	(L) Enforcement. The administrator shall take the necessary steps to enforce a discipline order after it is effective.	(L) Enforcement. The administrator shall take the necessary steps to enforce a discipline order after it is effective.
(M) Resignation by Respondent; Admission of Charges. An attorney's request that his or her name be stricken from the official register of attorneys may not be accepted while a request for investigation or a complaint is pending, except pursuant to an order of revocation.	(M) Resignation by Respondent; Admission of Charges. An attorney's ~~request that his or her name be stricken from the official register of attorneys~~ resignation may not be accepted while a request for investigation or a complaint is pending, except pursuant to an order of disbarment~~revocation~~.	(M) Resignation by Respondent; Admission of Charges. An attorney's ~~request that his or her name be stricken from the official register of attorneys~~ resignation may not be accepted while a request for investigation or a complaint is pending, except pursuant to an order of disbarment~~revocation~~.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
Rule 9.116 Hearing Procedure; Judges other than Magistrates and Referees (A) Application of this Rule. This rule governs an action by the commission against a judge, except that it does not apply to an action against a magistrate or referee for misconduct separately arising from the practice of law, whether before or during the period when the person serves as a magistrate or referee. (B) Time. The commission may not take action against a judge unless and until the Judicial Tenure Commission recommends a sanction. Then, notwithstanding the pendency of certification to and review by the Supreme Court of the Judicial Tenure Commission's action, the commission may, without an investigation, direct the administrator to file a complaint with the board. (C) Complaint; Time and Place of Hearing; Answer. The administrator shall file a complaint setting forth the facts of the alleged misconduct within 14 days after the Judicial Tenure Commission files its order with the Supreme Court. The chairperson of the hearing panel assigned by the board shall designate a place and a time for the hearing no later than 21 days	~~**Rule 9.116** Judges; Former Judges~~ ~~Hearing Procedure; Judges other than Magistrates and Referees~~ ~~(A) Application of this Rule. This rule governs an action by the commission against a judge, except that it does not apply to an action against a magistrate or referee for misconduct separately arising from the practice of law, whether before or during the period when the person serves as a magistrate or referee.~~ ~~(B) Time. The commission may not take action against a judge unless and until the Judicial Tenure Commission recommends a sanction. Then, notwithstanding the pendency of certification to and review by the Supreme Court of the Judicial Tenure Commission's action, the commission may, without an investigation, direct the administrator to file a complaint with the board.~~ ~~(C) Complaint; Time and Place of Hearing; Answer. The administrator shall file a complaint setting forth the facts of the alleged misconduct within 14 days after the Judicial Tenure Commission files its order with the Supreme Court. The chairperson of the hearing panel assigned by the board shall designate a place and a time for the hearing no later than 21 days~~	**Rule 9.116** Judges; Former Judges ~~Hearing Procedure; Judges other than Magistrates and Referees~~ ~~(A) Application of this Rule. This rule governs an action by the commission against a judge, except that it does not apply to an action against a magistrate or referee for misconduct separately arising from the practice of law, whether before or during the period when the person serves as a magistrate or referee.~~ ~~(B) Time. The commission may not take action against a judge unless and until the Judicial Tenure Commission recommends a sanction. Then, notwithstanding the pendency of certification to and review by the Supreme Court of the Judicial Tenure Commission's action, the commission may, without an investigation, direct the administrator to file a complaint with the board.~~ ~~(C) Complaint; Time and Place of Hearing; Answer. The administrator shall file a complaint setting forth the facts of the alleged misconduct within 14 days after the Judicial Tenure Commission files its order with the Supreme Court. The chairperson of the hearing panel assigned by the board shall designate a place and a time for the hearing no later~~

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
after the complaint is filed. The complaint and notice of the hearing must be served within 7 days after the complaint is filed. Within 14 days after the complaint and notice of the hearing are served, the respondent judge shall file an answer.	after the complaint is filed. The complaint and notice of the hearing must be served within 7 days after the complaint is filed. Within 14 days after the complaint and notice of the hearing are served, the respondent judge shall file an answer.	then 21 days after the complaint is filed. The complaint and notice of the hearing must be served within 7 days after the complaint is filed. Within 14 days after the complaint and notice of the hearing are served, the respondent judge shall file an answer.
(D) Rules Applicable; Judicial Tenure Commission Record. To the extent it is consistent with this rule, MCR 9.115 governs hearing procedure against a respondent judge. The record of the Judicial Tenure Commission proceeding is admissible at the hearing. The administrator or the respondent may introduce additional evidence.	(D) Rules Applicable; Judicial Tenure Commission Record. To the extent it is consistent with this rule, MCR 9.115 governs hearing procedure against a respondent judge. The record of the Judicial Tenure Commission proceeding is admissible at the hearing. The administrator or the respondent may introduce additional evidence.	(D) Rules Applicable; Judicial Tenure Commission Record. To the extent it is consistent with this rule, MCR 9.115 governs hearing procedure against a respondent judge. The record of the Judicial Tenure Commission proceeding is admissible at the hearing. The administrator or the respondent may introduce additional evidence.
(E) Decision. Within 28 days after the hearing is concluded, the panel must file with the Supreme Court clerk and the board a report and order conforming with MCR 9.115(J) and serve them on the administrator and the respondent.	(E) Decision. Within 28 days after the hearing is concluded, the panel must file with the Supreme Court clerk and the board a report and order conforming with MCR 9.115(J) and serve them on the administrator and the respondent.	(E) Decision. Within 28 days after the hearing is concluded, the panel must file with the Supreme Court clerk and the board a report and order conforming with MCR 9.115(J) and serve them on the administrator and the respondent.
(1) If the Judicial Tenure Commission has recommended suspension, the panel may not disbar the respondent and may not suspend the respondent from practicing law for a period beginning earlier than or extending beyond the suspension period recommended by the Judicial Tenure Commission.	(1) If the Judicial Tenure Commission has recommended suspension, the panel may not disbar the respondent and may not suspend the respondent from practicing law for a period beginning earlier than or extending beyond the suspension period recommended by the Judicial Tenure Commission.	(1) If the Judicial Tenure Commission has recommended suspension, the panel may not disbar the respondent and may not suspend the respondent from practicing law for a period beginning earlier than or extending beyond the suspension period recommended by the Judicial Tenure Commission.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(2) If the Judicial Tenure Commission has not recommended either suspension or removal from office, and the respondent continues to hold a judicial office, then the panel may not disbar or suspend the respondent. (3) If the Judicial Tenure Commission has recommended removal from office, or if the respondent no longer holds a judicial office, then the panel may impose any type of discipline authorized by these rules. (F) Appeal. The respondent-judge may file a petition for review under MCR 9.118.	~~(2) If the Judicial Tenure Commission has not recommended either suspension or removal from office, and the respondent continues to hold a judicial office, then the panel may not disbar or suspend the respondent.~~ ~~(3) If the Judicial Tenure Commission has recommended removal from office, or if the respondent no longer holds a judicial office, then the panel may impose any type of discipline authorized by these rules.~~ ~~(F) Appeal. The respondent-judge may file a petition for review under MCR 9.118.~~ (A) Judges. The commission may not take action against an incumbent judge, except that this rule does not prohibit an action by the commission against: (1) a magistrate or referee for misconduct separately arising from the practice of law, whether before or during the period when the person serves as a magistrate or referee; or (2) a visiting judge as provided for in MCR 9.203(E). If the Judicial Tenure Commission receives a request for investigation of a magistrate or referee or visiting judge arising from the practice of	~~(2) If the Judicial Tenure Commission has not recommended either suspension or removal from office, and the respondent continues to hold a judicial office, then the panel may not disbar or suspend the respondent.~~ ~~(3) If the Judicial Tenure Commission has recommended removal from office, or if the respondent no longer holds a judicial office, then the panel may impose any type of discipline authorized by these rules.~~ ~~(F) Appeal. The respondent-judge may file a petition for review under MCR 9.118.~~ (A) Judges. The administrator may not take action against an incumbent judge, except that this rule does not prohibit an action by the administrator against: (1) a magistrate or referee for misconduct unrelated to judicial functions, whether before or during the period when the person serves as a magistrate or referee; or (2) a visiting judge as provided for in MCR 9.203(E). If the Judicial Tenure Commission receives a request for investigation of a magistrate or referee or visiting judge unrelated to judicial

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	law, the Judicial Tenure Commission shall refer the matter to the commission for investigation in the first instance. If the administrator or the commission dismisses the request for investigation referred by the Judicial Tenure Commission, or a request for investigation of a magistrate, referee or visiting judge submitted directly to the commission by a complainant, the commission shall notify the Judicial Tenure Commission, which may take such action it deems appropriate. (B) Former Judges. The commission may take action against a former judge for conduct resulting in removal as a judge, and for any conduct which was not the subject of a disposition by the Judicial Tenure Commission or by the Court. The commission may not take action against a former judge for conduct where the court imposed a sanction less than removal or the Judicial Tenure Commission has taken any action under MCR 9.207(B)(1)-(5). (C) Judicial Tenure Commission Record. The record of the Judicial Tenure Commission proceeding is admissible at a hearing involving a former judge. The administrator or the respondent may introduce additional evidence.	functions, the Judicial Tenure Commission shall refer the matter to the administrator for investigation in the first instance. If the administrator or the commission dismisses the request for investigation referred by the Judicial Tenure Commission, or a request for investigation of a magistrate, referee or visiting judge submitted directly to the administrator by a complainant, the administrator shall notify the Judicial Tenure Commission, which may take such action it deems appropriate. (B) Former Judges. The administrator may take action against a former judge for conduct resulting in removal as a judge, and for any conduct which was not the subject of a disposition by the Judicial Tenure Commission or by the Court. The administrator may not take action against a former judge for conduct where the court imposed a sanction less than removal or the Judicial Tenure Commission has taken any action under MCR 9.207(B)(1)-(5). (C) Judicial Tenure Commission Record. The record of the Judicial Tenure Commission proceeding shall be admitted into the record at a hearing involving a former judge. The administrator or the respondent may

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
		introduce additional evidence.
Rule 9.118 Review of Order of Hearing Panel	**Rule 9.118** Review of Order of Hearing Panel	**Rule 9.118** Review of Order of Hearing Panel
(A) Review of Order; Time.	(A) Review of Order; Time.	(A) Review of Order; Time.
(1) The administrator, the complainant, or the respondent may petition the board in writing to review the order of a hearing panel filed under MCR 9.115, 9.116, 9.121 or 9.124. A petition for review must set forth the reasons and the grounds on which review is sought and must be filed with the board within 21 days after the order is served. The petitioner must serve copies of the petition and the accompanying documents on the other party and the complainant and file a proof of service with the board.	(1) The administrator, the complainant, or the respondent may petition the board in writing to review the order of a hearing panel filed under MCR 9.113(B), 9.115, 9.116, 9.120, 9.121, or 9.124. The administrator or the respondent may also petition the board for leave to appeal. Upon leave granted, the administrator or the respondent may petition the board for leave to review a non-final order. A petition for review must set forth the reasons and the grounds on which review is sought and must be filed with the board within 21 days after the order is served. The petitioner must serve copies of the petition and the accompanying documents on the other party and the complainant and file a proof of service with the board.	(1) The administrator, the complainant, or the respondent may petition the board in writing to review the order of a hearing panel filed under MCR 9.113(B), 9.115, 9.116, 9.120, 9.121, or 9.124. The administrator or the respondent may also petition the board for leave to appeal. Upon leave granted, the administrator or the respondent may petition the board to review a non-final order. A petition for review must set forth the reasons and the grounds on which review is sought and must be filed with the board within 21 days after the order is served. The petitioner must serve copies of the petition and the accompanying documents on the other party and the complainant and file a proof of service with the board.
(2) A cross-petition for review may be filed within 21 days after the petition for review is served on the cross-petitioner. The cross-petition must be served on the other party and the complainant, and a proof of service must be filed with the board.	(2) A cross-petition for review may be filed within 21 days after the petition for review is served on the cross-petitioner. The cross-petition must be served on the other party and the complainant, and a proof of service must be filed with the board.	(2) A cross-petition for review may be filed within 21 days after the petition for review is served on the cross-petitioner. The cross-petition must be served on the other party and the complainant, and a proof of service must be filed with the board.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(3) A delayed petition for review may be considered by the board chairperson under the guidelines of MCR 7.205(F). If a petition for review is filed more than 12 months after the order of the hearing panel is entered, the petition may not be granted. (B) Order to Show Cause. If a petition for review is timely filed or a delayed petition for review is accepted for filing, the board shall issue an order to show cause, at a date and time specified, why the order of the hearing panel should not be affirmed. The order shall establish a briefing schedule for all parties and may require that an answer to the petition or cross-petition be filed. An opposing party may file an answer even if the order does not require one. The board must serve the order to show cause on the administrator, respondent, and complainant at least 21 days before the hearing. Failure to comply with the order to show cause, including, but not limited to, a requirement for briefs, may be grounds for dismissal of a petition for review. Dismissal of a petition for review shall not affect the validity of a cross-petition for review. (C) Hearing.	(3) A delayed petition for review may be considered by the board chairperson under the guidelines of MCR 7.205(F). If a petition for review is filed more than 12 months after the order of the hearing panel is entered, the petition may not be granted. (B) Order to Show Cause. If a petition for review is timely filed or a delayed petition for review is accepted for filing, the board shall issue an order to show cause, at a date and time specified, why the order of the hearing panel should not be affirmed. The order shall establish a briefing schedule for all parties and may require that an answer to the petition or cross-petition be filed. An opposing party may file an answer even if the order does not require one. The board must serve the order to show cause on the administrator, respondent, and complainant at least 21 days before the hearing. Failure to comply with the order to show cause, including, but not limited to, a requirement for briefs, may be grounds for dismissal of a petition for review. Dismissal of a petition for review shall not affect the validity of a cross-petition for review. (C) Hearing.	(3) A delayed petition for review may be considered by the board chairperson under the guidelines of MCR 7.205(F). If a petition for review is filed more than 12 months after the order of the hearing panel is entered, the petition may not be granted. (B) Order to Show Cause. If a petition for review is timely filed or a delayed petition for review is accepted for filing, the board shall issue an order to show cause, at a date and time specified, why the order of the hearing panel should not be affirmed. The order shall establish a briefing schedule for all parties and may require that an answer to the petition or cross-petition be filed. An opposing party may file an answer even if the order does not require one. The board must serve the order to show cause on the administrator, respondent, and complainant at least 21 days before the hearing. Failure to comply with the order to show cause, including, but not limited to, a requirement for briefs, may be grounds for dismissal of a petition for review. Dismissal of a petition for review shall not affect the validity of a cross-petition for review. (C) Hearing.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(1) A hearing on the order to show cause must be heard by a subboard of at least 3 board members assigned by the chairperson. The board must make a final decision on consideration of the whole record, including a transcript of the presentation made to the subboard and the subboard's recommendation. The respondent shall appear personally at the review hearing unless excused by the board. Failure to appear may result in denial of any relief sought by the respondent, or any other action allowable under MCR 9.118(D). (2) If the board believes that additional testimony should be taken, it may refer the case to a hearing panel or a master. The panel or the master shall then take the additional testimony and make a supplemental report, including a transcript of the additional testimony, pleadings, exhibits, and briefs with the board. Notice of the filing of the supplemental report and a copy of the report must be served as an original report and order of a hearing panel. (D) Decision. After the hearing on the order to show cause, the board may affirm, amend, reverse, or nullify the order of the hearing panel in whole or in part or order other discipline. A discipline order is not effective until 28 days after it is	(1) A hearing on the order to show cause must be heard by a subboard of at least 3 board members assigned by the chairperson. The board must make a final decision on consideration of the whole record, including a transcript of the presentation made to the subboard and the subboard's recommendation. The respondent shall appear personally at the review hearing unless excused by the board. Failure to appear may result in denial of any relief sought by the respondent, or any other action allowable under MCR 9.118(D). (2) If the board believes that additional testimony should be taken, it may refer the case to a hearing panel or a master. The panel or the master shall then take the additional testimony and shall make a supplemental report, including a transcript of the additional testimony, pleadings, exhibits, and briefs with the board. Notice of the filing of the supplemental report and a copy of the report must be served as an original report and order of a hearing panel. (D) Decision. After the hearing on the order to show cause, the board may affirm, amend, reverse, or nullify the order of the hearing panel in whole or in part or order other discipline. A discipline order is not effective until 28 days after it	(1) A hearing on the order to show cause must be heard by a subboard of at least 3 board members assigned by the chairperson. The board must make a final decision on consideration of the whole record, including a transcript of the presentation made to the subboard and the subboard's recommendation. The respondent shall appear personally at the review hearing unless excused by the board. Failure to appear may result in denial of any relief sought by the respondent, or any other action allowable under MCR 9.118(D). (2) If the board believes that additional testimony should be taken, it may refer the case to a hearing panel or a master. The panel or the master shall then take the additional testimony and shall make a supplemental report, including a transcript of the additional testimony, pleadings, exhibits, and briefs with the board. Notice of the filing of the supplemental report and a copy of the report must be served as an original report and order of a hearing panel. (D) Decision. After the hearing on the order to show cause, the board may affirm, amend, reverse, or nullify the order of the hearing panel in whole or in part or order other discipline. A discipline order is not effective until 28

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
served on the respondent unless the board finds good cause for the order to take effect earlier.	is served on the respondent unless the board finds good cause for the order to take effect earlier.	days after it is served on the respondent unless the board finds good cause for the order to take effect earlier.
(E) Motion for Reconsideration; Stay. A motion for reconsideration may be filed at any time before the board's order takes effect. An answer to a motion for reconsideration may be filed. The board may grant a stay pending its decision on a motion for reconsideration.	(E) Motion for Reconsideration; Stay. A motion for reconsideration may be filed at any time before the board's order takes effect. An answer to a motion for reconsideration may be filed. ~~The board may grant a stay pending its decision on a motion for reconsideration.~~ If the discipline order is a suspension for 179 days or less, a stay of the discipline order will automatically issue on the timely filing by the respondent of a motion for reconsideration. If the discipline is greater than a 179-day suspension, the respondent may petition for a stay. If the board grants a stay, the stay remains effective for 28 days after the board enters its order granting or denying reconsideration. ~~In the absence of an order by the board, the filing of a motion for reconsideration does not stay an order of discipline.~~	(E) Motion for Reconsideration; Stay. A motion for reconsideration may be filed at any time before the board's order takes effect. An answer to a motion for reconsideration may be filed. ~~The board may grant a stay pending its decision on a motion for reconsideration.~~ If the discipline order is a suspension for 179 days or less, a stay of the discipline order will automatically issue on the timely filing by the respondent of a motion for reconsideration. If the discipline is greater than a 179-day suspension, the respondent may petition for a stay. If the board grants a stay, the stay remains effective for 28 days after the board enters its order granting or denying reconsideration. ~~In the absence of an order by the board, the filing of a motion for reconsideration does not stay an order of discipline.~~
If the board grants a stay, the stay remains effective for 28 days after the board enters its order granting or denying reconsideration. In the absence of an order by the board, the filing of a motion for reconsideration does not stay an order of discipline.		
(F) Filing Orders. The board must file a copy of its discipline order with the Supreme Court clerk and the clerk of the county where the respondent resides and where his or her office is located. The order must be served on all parties. If the respondent requests it in writing, a dismissal order must be similarly filed and	(F) Filing Orders. The board must file a copy of its discipline order with the Supreme Court clerk and the clerk of the county where the respondent resides and where his or her office is located. The order must be served on all parties. If the respondent requests it in writing, a dismissal order must be similarly filed and	(F) Filing Orders. The board must file a copy of its discipline order with the Supreme Court clerk and the clerk of the county where the respondent resides and where his or her office is located. The order must be served on all parties. If the respondent requests it in writing, a dismissal order must be similarly filed

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
served.	served.	and served.
Rule 9.119 Conduct of Disbarred, Suspended, or Inactive Attorneys	**Rule 9.119** Conduct of Disbarred, Suspended, or Inactive Attorneys	**Rule 9.119** Conduct of Disbarred, Suspended, or Inactive Attorneys
(A) Notification to Clients. An attorney whose license is revoked or suspended, or who is transferred to inactive status pursuant to MCR 9.121, or who is suspended for nondisciplinary reasons pursuant to Rule 4 of the Supreme Court Rules Concerning the State Bar of Michigan, shall, within 7 days of the effective date of the order of discipline, the transfer to inactive status or the nondisciplinary suspension, notify all of his or her active clients, in writing, by registered or certified mail, return receipt requested, of the following:	(A) Notification to Clients. An attorney ~~whose license is revoked or suspended, or~~ who has resigned, or been disbarred, or suspended, or who is transferred to inactive status pursuant to MCR 9.121, or who is suspended for nondisciplinary reasons pursuant to Rule 4 of the Supreme Court Rules Concerning the State Bar of Michigan, shall, within 7 days of the effective date of the order of discipline, resignation, ~~the~~ transfer to inactive status, or ~~the~~ nondisciplinary suspension, notify all of his or her active clients, in writing, by registered or certified mail, return receipt requested, of the following:	(A) Notification to Clients. An attorney ~~whose license is revoked or suspended, or~~ who has resigned under Rule 3 of the Rules Concerning the State Bar of Michigan, or been disbarred, or suspended, or who is transferred to inactive status pursuant to MCR 9.121, or who is suspended for nondisciplinary reasons pursuant to Rule 4 of the Supreme Court Rules Concerning the State Bar of Michigan, shall, within 7 days of the effective date of the order of discipline, ~~the~~ transfer to inactive status, or ~~the~~ nondisciplinary suspension, notify all of his or her active clients, in writing, by registered or certified mail, return receipt requested, of the following:
(1) the nature and duration of the discipline imposed, the transfer to inactive status, or the nondisciplinary suspension;	(1) the nature and duration of the discipline imposed, the transfer to inactive status, or the nondisciplinary suspension, or the resignation from membership in the State Bar of Michigan;	(1) the nature and duration of the discipline imposed, the transfer to inactive status, or the nondisciplinary suspension, or the resignation;
(2) the effective date of such discipline, transfer to inactive status, or nondisciplinary suspension;	(2) the effective date of such discipline, transfer to inactive status, ~~or~~ nondisciplinary suspension, or	(2) the effective date of such discipline, transfer to inactive status, ~~or~~ nondisciplinary suspension, or

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	resignation;	resignation;
(3) the attorney's inability to act as an attorney after the effective date of such discipline, transfer to inactive status, or nondisciplinary suspension;	(3) the attorney's inability to act as an attorney after the effective date of such discipline, transfer to inactive status, ~~or~~ nondisciplinary suspension, or resignation;	(3) the attorney's inability to act as an attorney after the effective date of such discipline, transfer to inactive status, ~~or~~ nondisciplinary suspension, or resignation;
(4) the location and identity of the custodian of the clients' files and records, which will be made available to them or to substitute counsel;	(4) the location and identity of the custodian of the clients' files and records, which will be made available to them or to substitute counsel;	(4) the location and identity of the custodian of the clients' files and records, which will be made available to them or to substitute counsel;
(5) that the clients may wish to seek legal advice and counsel elsewhere; provided that, if the disbarred, suspended or inactive attorney was a member of a law firm, the firm may continue to represent each client with the client's express written consent;	(5) that the clients may wish to seek legal advice and counsel elsewhere; provided that, if the disbarred, suspended, ~~or~~ inactive, or resigned attorney was a member of a law firm, the firm may continue to represent each client with the client's express written consent;	(5) that the clients may wish to seek legal advice and counsel elsewhere; provided that, if the disbarred, suspended, ~~or~~ inactive, or resigned attorney was a member of a law firm, the firm may continue to represent each client with the client's express written consent;
(6) the address to which all correspondence to the attorney may be addressed.	(6) the address to which all correspondence to the attorney may be addressed.	(6) the address to which all correspondence to the attorney may be addressed.
(B) Conduct in Litigated Matters. In addition to the requirements of subsection (A) of this rule, the affected attorney must, by the effective date of the order of revocation, suspension, or transfer to inactive status, in every matter in which the attorney is representing a client in litigation, file with the tribunal and all parties a notice of the attorney's	(B) Conduct in Litigated Matters. In addition to the requirements of subsection (A) of this rule, the affected attorney must, by the effective date of the order of ~~revocation~~ disbarment, suspension, or transfer to inactive status, or of a resignation, in every matter in which the attorney is representing a client in litigation, file with the tribunal and all	(B) Conduct in Litigated Matters. In addition to the requirements of subsection (A) of this rule, the affected attorney must, by the effective date of the order of ~~revocation~~ disbarment, suspension, or transfer to inactive status, or of a resignation, in every matter in which the attorney is representing a client in litigation, file with the tribunal and all

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
disqualification from the practice of law.	parties a notice of the attorney's disqualification from the practice of law. The affected attorney shall either file a motion to withdraw from the representation, or, with the client's knowledge and consent, a substitution of counsel.	parties a notice of the attorney's disqualification from the practice of law. The affected attorney shall either file a motion to withdraw from the representation, or, with the client's knowledge and consent, a substitution of counsel.
(C) Filing of Proof of Compliance. Within 14 days after the effective date of the order of revocation, suspension, or transfer to inactive status pursuant to MCR 9.121, the disbarred, suspended, or inactive attorney shall file with the administrator and the board an affidavit showing full compliance with this rule. The affidavit must include as an appendix copies of the disclosure notices and mailing receipts required under subrules (A) and (B) of this rule. A disbarred, suspended, or inactive attorney shall keep and maintain records of the various steps taken under this rule so that, in any subsequent proceeding instituted by or against him or her, proof of compliance with this rule and with the disbarment or suspension order will be available.	(C) Filing of Proof of Compliance. Within 14 days after the effective date of the order of ~~revocation~~ disbarment, suspension, ~~or~~ transfer to inactive status pursuant to MCR 9.121, or of a resignation, the disbarred, suspended, ~~or~~ inactive, or resigned attorney shall file with the administrator and the board an affidavit showing full compliance with this rule. The affidavit must include as an appendix copies of the disclosure notices and mailing receipts required under subrules (A) and (B) of this rule. The affidavit must set forth any claim by the affected attorney that he or she does not have active clients at the time of the effective date of the change in status. A disbarred, suspended, ~~or~~ inactive, or resigned attorney shall keep and maintain records of the various steps taken under this rule so that, in any subsequent proceeding instituted by or against him or her, proof of compliance with this rule and with the disbarment or suspension order will be available.	(C) Filing of Proof of Compliance. Within 14 days after the effective date of the order of ~~revocation~~ disbarment, suspension, ~~or~~ transfer to inactive status pursuant to MCR 9.121, or of a resignation, the disbarred, suspended, ~~or~~ inactive, or resigned attorney shall file with the administrator and the board an affidavit showing full compliance with this rule. The affidavit must include as an appendix copies of the disclosure notices and mailing receipts required under subrules (A) and (B) of this rule. The affidavit must set forth any claim by the affected attorney that he or she does not have active clients at the time of the effective date of the change in status. A disbarred, suspended, ~~or~~ inactive, or resigned attorney shall keep and maintain records of the various steps taken under this rule so that, in any subsequent proceeding instituted by or against him or her, proof of compliance with this rule and with the disbarment or suspension order will be available.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(D) Conduct After Entry of Order Prior to Effective Date. A disbarred or suspended attorney, after entry of the order of revocation or suspension and prior to its effective date, shall not accept any new retainer or engagement as attorney for another in any new case or legal matter of any nature, unless specifically authorized by the board chairperson upon a showing of good cause and a finding that it is not contrary to the interests of the public and profession. However, during the period between the entry of the order and its effective date, the suspended or disbarred attorney may complete, on behalf of any existing client, all matters that were pending on the entry date.	(D) Conduct After Entry of Order Prior to Effective Date. A disbarred or suspended attorney, after entry of the order of ~~revocation~~ disbarment or suspension and prior to its effective date, shall not accept any new retainer or engagement as an attorney for another in any new case or legal matter of any nature, unless specifically authorized by the board chairperson upon a showing of good cause and a finding that it is not contrary to the interests of the public and profession. However, during the period between the entry of the order and its effective date, the suspended or disbarred attorney may complete, on behalf of any existing client, all matters that were pending on the entry date.	(D) Conduct After Entry of Order Prior to Effective Date. A disbarred or suspended attorney, after entry of the order of ~~revocation~~ disbarment or suspension and prior to its effective date, shall not accept any new retainer or engagement as an attorney for another in any new case or legal matter of any nature, unless specifically authorized by the board chairperson upon a showing of good cause and a finding that it is not contrary to the interests of the public and profession. However, during the period between the entry of the order and its effective date, the suspended or disbarred attorney may complete, on behalf of any existing client, all matters that were pending on the entry date.
(E) Conduct After Effective Date of Order. An attorney who is disbarred or suspended, or who is transferred to inactive status pursuant to MCR 9.121 is, during the period of disbarment, suspension, or inactivity forbidden from:	(E) Conduct After Effective Date of Order. An attorney who is disbarred, ~~or~~ resigned or suspended, ~~or~~ who is transferred to inactive status pursuant to MCR 9.121, or who resigns is, during the period of disbarment, suspension, or inactivity, or from and after the date of resignation, forbidden from:	(E) Conduct After Effective Date of Order. An attorney who is disbarred, ~~or~~ resigned or suspended, ~~or~~ who is transferred to inactive status pursuant to MCR 9.121, or who resigns is, during the period of disbarment, suspension, or inactivity, or from and after the date of resignation, forbidden from:
(1) practicing law in any form;	(1) practicing law in any form;	(1) practicing law in any form;
	(2) contact either in person, by telephone, or by electronic means, with clients or potential clients of a lawyer or law firm either as a paralegal, law clerk, legal	(2) contact either in person, by telephone, or by electronic means, with clients or potential clients of a lawyer or law firm either as a paralegal, law clerk, legal

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	assistant, or lawyer;	assistant, or lawyer;
(2) appearing as an attorney before any court, judge, justice, board, commission, or other public authority; and	(23) appearing as an attorney before any court, judge, justice, board, commission, or other public authority; and	(23) appearing as an attorney before any court, judge, justice, board, commission, or other public authority; and
(3) holding himself or herself out as an attorney by any means.	(34) holding himself or herself out as an attorney by any means.	(34) holding himself or herself out as an attorney by any means.
(F) Compensation of Disbarred, Suspended, or Inactive Attorney. An attorney whose license is revoked or suspended, or who is transferred to inactive status pursuant to MCR 9.121 may not share in any legal fees for legal services performed by another attorney during the period of disqualification from the practice of law. A disbarred, suspended, or inactive attorney may be compensated on a quantum meruit basis for legal services rendered and expenses paid by him or her prior to the effective date of the revocation, suspension, or transfer to inactive status.	(F) Compensation of Disbarred, Suspended, or Inactive Attorney. An attorney ~~whose license is revoked~~ who has been disbarred or suspended, has resigned, or who is transferred to inactive status pursuant to MCR 9.121 may not share in any legal fees for legal services performed by another attorney during the period of disqualification from the practice of law. A disbarred, suspended, resigned or inactive attorney may be compensated on a quantum meruit basis for legal services rendered and expenses paid by him or her prior to the effective date of the ~~revocation~~ disbarment, suspension, resignation, or transfer to inactive status.	(F) Compensation of Disbarred, Suspended, Resigned, or Inactive Attorney. An attorney ~~whose license is revoked~~ who has been disbarred or suspended, has resigned, or who is transferred to inactive status pursuant to MCR 9.121 may not share in any legal fees for legal services performed by another attorney during the period of disqualification from the practice of law. A disbarred, suspended, resigned or inactive attorney may be compensated on a quantum meruit basis for legal services rendered and expenses paid by him or her prior to the effective date of the ~~revocation~~ disbarment, suspension, resignation, or transfer to inactive status.
(G) Inventory. If the attorney whose license is revoked or suspended, or who is transferred to inactive status pursuant to MCR 9.121 was a member of a firm, the firm may continue to represent each client with the client's express written consent. If an attorney is transferred to inactive status	(G) ~~Inventory~~ Receivership.	(G) ~~Inventory~~ Receivership.
	(1) Attorney with a firm. If ~~the~~ an attorney ~~whose license~~ who is a member of a firm is ~~revoked~~ disbarred, ~~or~~ suspended, or ~~who is~~ transferred to inactive status pursuant to MCR 9.121, or	(1) Attorney with a firm. If ~~the~~ an attorney ~~whose license~~ who is a member of a firm is ~~revoked~~ disbarred, or suspended, or who is transferred to inactive status pursuant to MCR 9.121, or

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
or is disbarred or suspended and fails to give notice under the rule, or disappears or dies, and there is no partner, executor or other responsible person capable of conducting the attorney's affairs, the administrator may ask the chief judge in the judicial circuit in which the attorney maintained his or her practice to appoint a person to inventory the attorney's files and to take any action necessary to protect the interests of the attorney and the attorney's clients. The person appointed may not disclose any information contained in any inventoried file without the client's written consent. The person appointed is analogous to a receiver operating under the direction of the circuit court.	resigns his or her license to practice law ~~was a member of a firm~~, the firm may continue to represent each client with the client's express written consent. Copies of the signed consents shall be maintained with the client file. (2) Attorney practicing alone. If an attorney is transferred to inactive status, resigns, or is disbarred or suspended and fails to give notice under the rule, or disappears, is imprisoned, or dies, and there is no partner, executor or other responsible person capable of conducting the attorney's affairs, the administrator may ask the chief judge of the probate court in the ~~judicial circuit~~ county in which the attorney maintained his or her practice to appoint a person to act as a receiver with necessary powers, including: (a) To obtain and inventory the attorney's files; (b) ~~and to~~ To take any action necessary to protect the interests of the attorney and the attorney's clients; (c) To change the address at which the attorney's mail is delivered and to open the mail; or (d) To secure (garner) the lawyer's bank	resigns his or her license to practice law ~~was a member of a firm~~, the firm may continue to represent each client with the client's express written consent. Copies of the signed consents shall be maintained with the client file. (2) Attorney practicing alone. If an attorney is transferred to inactive status, resigns, or is disbarred or suspended and fails to give notice under the rule, or disappears, is imprisoned, or dies, and there is no partner, executor or other responsible person capable of conducting the attorney's affairs, the administrator may ask the chief judge of the probate court in the ~~judicial circuit~~ county in which the attorney maintained his or her practice to appoint a person to act as a receiver with necessary powers, including: (a) To obtain and inventory the attorney's files; (b) ~~and to~~ To take any action necessary to protect the interests of the attorney and the attorney's clients; (c) To change the address at which the attorney's mail is delivered and to open the mail; or (d) To secure (garner) the lawyer's bank

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	accounts.	accounts.
	~~The person appointed may not disclose any information contained in any inventoried file without the client's written consent.~~ The person appointed is analogous to a receiver operating under the direction of the ~~circuit~~ probate court.	~~The person appointed may not disclose any information contained in any inventoried file without the client's written consent.~~ The person appointed is analogous to a receiver operating under the direction of the ~~circuit~~ probate court.
	(3) Confidentiality. The person appointed may not disclose to any third parties any information protected by MRPC 1.6 without the client's written consent.	(3) Confidentiality. The person appointed may not disclose to any third parties any information protected by MRPC 1.6 without the client's written consent.
	(4) Costs. In actions commenced by the grievance administrator under this rule, courts shall not require the grievance administrator to pay filing or other court fees or costs, including fees and costs for filing executed wills located in the files and records in the inventoried files.	(4) Costs. In actions commenced by the grievance administrator under this rule, courts shall not require the grievance administrator to pay filing or other court fees or costs, including fees and costs for filing executed wills located in the files and records in the inventoried files.
	(5) Publication of Notice. Upon receipt of notification from the receiver, the State Bar shall publish in the Michigan Bar Journal notice of the receivership, including the name and address of the subject attorney, and the name, address, and telephone number of the receiver.	(5) Publication of Notice. Upon receipt of notification from the receiver, the State Bar shall publish in the Michigan Bar Journal notice of the receivership, including the name and address of the subject attorney, and the name, address, and telephone number of the receiver.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
Rule 9.120 Conviction of Criminal Offense (A) Notification of the Grievance Administrator and the Attorney Discipline Board When a lawyer is convicted of a crime, the lawyer, the prosecutor or other authority who prosecuted the lawyer, and the defense attorney who represented the lawyer must notify the grievance administrator and the board of the conviction. This notice must be given in writing within 14 days after the conviction.	**Rule 9.120** Conviction of Criminal Offense; Reciprocal Discipline (A) Notification of the Grievance Administrator and the Attorney Discipline Board (1) When a lawyer is convicted of a crime, the lawyer, the prosecutor or other authority who prosecuted the lawyer, and the defense attorney who represented the lawyer must notify the grievance administrator and the board of the conviction. This notice must be given in writing within 14 days after the conviction. (2) A lawyer who has been the subject of an order of discipline or transfer to inactive status by any court of record or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys of the United States or of any state or territory of the United States or of the District of Columbia, or who has resigned from the bar or roster of attorneys in lieu of discipline by, or during the pendency of, discipline proceedings before such court or body shall inform the grievance administrator and board of entry of such order, transfer, or resignation within 14 days of the entry of the order, transfer, or resignation.	**Rule 9.120** Conviction of Criminal Offense; Reciprocal Discipline (A) Notification of the Grievance Administrator and the Attorney Discipline Board (1) When a lawyer is convicted of a crime, the lawyer, the prosecutor or other authority who prosecuted the lawyer, and the defense attorney who represented the lawyer must notify the grievance administrator and the board of the conviction. This notice must be given in writing within 14 days after the conviction. (2) A lawyer who has been the subject of an order of discipline or transfer to inactive status by any court of record or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys of the United States or of any state or territory of the United States or of the District of Columbia, or who has resigned from the bar or roster of attorneys in lieu of discipline by, or during the pendency of, discipline proceedings before such court or body shall inform the grievance administrator and board of entry of such order, transfer, or resignation within 14 days of the entry of the order, transfer, or resignation.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(B) Suspension.	(B) ~~Suspension~~ Criminal Conviction.	(B) ~~Suspension~~ Criminal Conviction.
(1) On conviction of a felony, an attorney is automatically suspended until the effective date of an order filed by a hearing panel under MCR 9.115(J). A conviction occurs upon the return of a verdict of guilty or upon the acceptance of a plea of guilty or nolo contendere. The board may, on the attorney's motion, set aside the automatic suspension when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public, and the interests of justice. The board must set aside the automatic suspension if the felony conviction is vacated, reversed, or otherwise set aside for any reason by the trial court or an appellate court.	(1) On conviction of a felony, an attorney is automatically suspended until the effective date of an order filed by a hearing panel under MCR 9.115(J). A conviction occurs upon the return of a verdict of guilty or upon the acceptance of a plea of guilty or nolo contendere. The board may, on the attorney's motion, set aside the automatic suspension when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public, and the interests of justice. The board must set aside the automatic suspension if the felony conviction is vacated, reversed, or otherwise set aside for any reason by the trial court or an appellate court.	(1) On conviction of a felony, an attorney is automatically suspended until the effective date of an order filed by a hearing panel under MCR 9.115(J). A conviction occurs upon the return of a verdict of guilty or upon the acceptance of a plea of guilty or nolo contendere. The board may, on the attorney's motion, set aside the automatic suspension when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public, and the interests of justice. The board must set aside the automatic suspension if the felony conviction is vacated, reversed, or otherwise set aside for any reason by the trial court or an appellate court.
(2) In a disciplinary proceeding instituted against an attorney based on the attorney's conviction of a criminal offense, a certified copy of the judgment of conviction is conclusive proof of the commission of the criminal offense.	(2) In a disciplinary proceeding instituted against an attorney based on the attorney's conviction of a criminal offense, a certified copy of the judgment of conviction is conclusive proof of the commission of the criminal offense.	(2) In a disciplinary proceeding instituted against an attorney based on the attorney's conviction of a criminal offense, a certified copy of the judgment of conviction is conclusive proof of the commission of the criminal offense.
(3) The administrator may file with the board a judgment of conviction showing that an attorney has violated a criminal law of a state or of the United States. The board shall then order the attorney to show cause why a final order of discipline	(3) The administrator may file with the board a judgment of conviction showing that an attorney has violated a criminal law of a state or of the United States. The board shall then order the attorney to show cause why a final order of discipline	(3) The administrator may file with the board a judgment of conviction showing that an attorney has violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615. The board shall then order

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
should not be entered, and the board shall refer the proceeding to a hearing panel for hearing. At the hearing, questions as to the validity of the conviction, alleged trial errors, and the availability of appellate remedies shall not be considered. After the hearing, the panel shall issue an order under MCR 9.115(J).	should not be entered, and the board shall refer the proceeding to a hearing panel for hearing. At the hearing, questions as to the validity of the conviction, alleged trial errors, and the availability of appellate remedies shall not be considered. After the hearing, the panel shall issue an order under MCR 9.115(J).	the attorney to show cause why a final order of discipline should not be entered, and the board shall refer the proceeding to a hearing panel for hearing. At the hearing, questions as to the validity of the conviction, alleged trial errors, and the availability of appellate remedies shall not be considered. After the hearing, the panel shall issue an order under MCR 9.115(J).
(C) Pardon; Conviction Reversed. On a pardon the board may, and on a reversal the board must, by order filed and served under MCR 9.118(E), vacate the suspension. The attorney's name must be returned to the roster of Michigan attorneys and counselors at law, but the administrator may nevertheless proceed against the respondent for misconduct which had led to the criminal charge.	~~(C) Pardon; Conviction Reversed.~~ (1) On a pardon the board may, and on a reversal of the conviction the board must, by order filed and served under MCR 9.118~~(E)~~(F), vacate the ~~suspension~~ order of discipline. The attorney's name must be returned to the roster of Michigan attorneys and counselors at law, but the administrator may nevertheless proceed against the respondent for misconduct which had led to the criminal charge. (C) Reciprocal Discipline. (1) A certified copy of a final adjudication by any court of record or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys by any state or territory of the United States or of the District of Columbia, a United States court, or a federal administrative agency, determining that an attorney, whether or	~~(C) Pardon; Conviction Reversed.~~ (1) On a pardon the board may, and on a reversal of the conviction the board must, by order filed and served under MCR 9.118~~(E)~~(F), vacate the ~~suspension~~ order of discipline. The attorney's name must be returned to the roster of Michigan attorneys and counselors at law, but the administrator may nevertheless proceed against the respondent for misconduct which had led to the criminal charge. (C) Reciprocal Discipline. (1) A certified copy of a final adjudication by any court of record or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys by any state or territory of the United States or of the District of Columbia, a United States court, or a federal administrative agency, determining that an attorney, whether or

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	not admitted in that jurisdiction, has committed misconduct or has been transferred to disability inactive status, shall establish conclusively the misconduct or the disability for purposes of a proceeding under subchapter 9.120 of these rules and comparable discipline or transfer shall be imposed in the Michigan proceeding unless the respondent was not afforded due process of law in the course of the original proceedings, the imposition of comparable discipline or transfer in Michigan would be clearly inappropriate, or the reason for the original transfer to disability inactive status no longer exists. (2) Upon the filing by the grievance administrator of a certified copy of final adjudication described in paragraph (CX1) with the board, the board shall issue an order directed to the lawyer and the administrator: (a) attaching a copy of the order from the other jurisdiction; and (b) directing, that, within 21 days from service of the order, the lawyer and administrator shall inform the board (i) of any objection to the imposition of comparable discipline or disability inactive status in Michigan based on the grounds set forth in paragraph (CX1) of	not admitted in that jurisdiction, has committed misconduct or has been transferred to disability inactive status, shall establish conclusively the misconduct or the disability for purposes of a proceeding under subchapter 9.120 of these rules and comparable discipline or transfer shall be imposed in the Michigan proceeding unless the respondent was not afforded due process of law in the course of the original proceedings, the imposition of comparable discipline or transfer in Michigan would be clearly inappropriate, or the reason for the original transfer to disability inactive status no longer exists. (2) Upon the filing by the grievance administrator of a certified copy of final adjudication described in paragraph (CX1) with the board, the board shall issue an order directed to the lawyer and the administrator: (a) attaching a copy of the order from the other jurisdiction; and (b) directing, that, within 21 days from service of the order, the lawyer and administrator shall inform the board (i) of any objection to the imposition of comparable discipline or disability inactive status in Michigan based on the grounds set forth in paragraph (CX1) of

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	this rule, and (ii) whether a hearing is requested. (3) Upon receipt of an objection to the imposition of comparable discipline or disability inactive status raising one or more of the issues identified in paragraph (C)(1) of this rule, the board shall assign the matter to a hearing panel for disposition. The opposing party shall have 21 days to reply to an objection. If a hearing is requested, and the hearing panel grants the request, the hearing shall be held in accordance with the procedures set forth in MCR 9.115 except as otherwise provided in this rule. (4) Papers filed under this rule shall conform as nearly as practicable to the requirements of subchapter 2.100 and shall be filed with the board and served on the opposing party and each member of the hearing panel once assigned. (5) The burden is on the party seeking to avoid the imposition of comparable discipline or transfer to disability inactive status to demonstrate that it is not appropriate for one or more of the grounds set forth in paragraph (C)(1). "Comparable" discipline does not mean that the dates of a period of disqualification from practice in this state must coincide with the dates of the period	this rule, and (ii) whether a hearing is requested. (3) Upon receipt of an objection to the imposition of comparable discipline or disability inactive status raising one or more of the issues identified in paragraph (C)(1) of this rule, the board shall assign the matter to a hearing panel for disposition. The opposing party shall have 21 days to reply to an objection. If a hearing is requested, and the hearing panel grants the request, the hearing shall be held in accordance with the procedures set forth in MCR 9.115 except as otherwise provided in this rule. (4) Papers filed under this rule shall conform as nearly as practicable to the requirements of subchapter 2.100 and shall be filed with the board and served on the opposing party and each member of the hearing panel once assigned. (5) The burden is on the party seeking to avoid the imposition of comparable discipline or transfer to disability inactive status to demonstrate that it is not appropriate for one or more of the grounds set forth in paragraph (C)(1). "Comparable" discipline does not mean that the dates of a period of disqualification from practice in this state must coincide with the dates of the

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	of disqualification, if any, in the original jurisdiction. (6) If the 21 day period discussed in paragraph (C)(2)(b) has expired without objection by either party, the respondent is in default, with the same effect as a default in a civil action, and the board shall impose comparable discipline or transfer to disability inactive status unless it appears that one of the grounds set forth in paragraph (C)(1) of this rule requires a different result, in which case the board shall schedule a hearing in accord with paragraph (3) of this rule. An order entered pursuant to this subparagraph may be set aside if the requirements of MCR 2.603(D) are established. (7) In the event the discipline or transfer to disability inactive status imposed in the original jurisdiction is stayed, any reciprocal discipline imposed in Michigan shall be deferred until the stay expires.	period of disqualification, if any, in the original jurisdiction. (6) If the 21 day period discussed in paragraph (C)(2)(b) has expired without objection by either party, the respondent is in default, with the same effect as a default in a civil action, and the board shall impose comparable discipline or transfer to disability inactive status unless it appears that one of the grounds set forth in paragraph (C)(1) of this rule requires a different result, in which case the board shall schedule a hearing in accord with paragraph (3) of this rule. An order entered pursuant to this subparagraph may be set aside if the requirements of MCR 2.603(D) are established. (7) In the event the discipline or transfer to disability inactive status imposed in the original jurisdiction is stayed, any reciprocal discipline imposed in Michigan shall be deferred until the stay expires.
Rule 9.121 Attorney Declared to be Incompetent or Alleged to be Incapacitated or Asserting Impaired Ability	**Rule 9.121** Attorney Declared to be Incompetent or Alleged to be Incapacitated or Asserting Impaired Ability	**Rule 9.121** Attorney Declared to be Incompetent or Alleged to be Incapacitated or Asserting Impaired Ability
(A) Adjudication by Court. If an attorney	(A) Adjudication by Court. If an attorney	(A) Adjudication by Court. If an attorney

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability, the board, on proper proof of the fact, must enter an order effective immediately transferring the attorney to inactive status for an indefinite period and until further order of the board.	has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability, the board, on proper proof of the fact, must enter an order effective immediately transferring the attorney to inactive status for an indefinite period and until further order of the board.	has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability, the board, on proper proof of the fact, must enter an order effective immediately transferring the attorney to inactive status for an indefinite period and until further order of the board.
(B) Allegations of Incompetency or Incapacity.	(B) Allegations of Incompetency or Incapacity.	(B) Allegations of Incompetency or Incapacity.
(1) If it is alleged in a complaint by the administrator that an attorney is incapacitated to continue the practice of law because of mental or physical infirmity or disability or because of addiction to drugs or intoxicants, a hearing panel shall take action necessary to determine whether the attorney is incapacitated, including an examination of the attorney by qualified medical experts the board designates.	(1) If it is alleged in a complaint by the administrator that an attorney is incapacitated to continue the practice of law because of mental or physical infirmity or disability or because of addiction to drugs or intoxicants, a hearing panel shall take action necessary to determine whether the attorney is incapacitated ~~, including an examination of the attorney by qualified medical experts the board designates.~~; (a) Examination. (1) Upon a showing of good cause that a mental or physical condition is the basis of respondent's incompetency or incapacity as alleged in a complaint by the administrator, a hearing panel may order respondent to submit to one or more medical examination(s) or psychological examination(s) that are relevant to a	(1) If it is alleged in a complaint by the administrator that an attorney is incapacitated to continue the practice of law because of mental or physical infirmity or disability or because of addiction to drugs or intoxicants, a hearing panel shall take action necessary to determine whether the attorney is incapacitated ~~, including an examination of the attorney by qualified medical experts the board designates.~~; (a) Independent examination. (1) Upon demand by the administrator or pursuant to an order of a panel, a respondent may be required to submit to one or more medical examination or psychological examination(s) by board-certified or other licensed professionals. Within 30 days of the conclusion of the examination and testing, the medical

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	condition of respondent shown to be in controversy. (2) If testing is ordered, the administrator and respondent may stipulate to the expert(s) who will conduct the examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. The content of a report prepared by an expert(s) pursuant to this paragraph is admissible into evidence in the proceedings, subject to relevancy objections. (3) If the administrator and/or respondent hire their own expert(s) to conduct the examination(s), the expert(s) will conduct the examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. A report prepared pursuant to this paragraph is only admissible as substantive evidence upon stipulation by both parties. The respondent will be responsible for the expenses incurred by retaining his or her examiner. (4) On its own motion or on the motion of either party, the hearing panel may appoint an expert of its own selection to conduct the necessary examination(s). The expert so appointed will conduct the	examiner shall prepare a report which includes: (A) The expert's resume or curriculum vitae. (B) A statement of facts, and a list of the tests which were administered and the test results. (C) A diagnosis, prognosis, a statement of limitations on the opinion because of the scope of the examination or testing, and recommendation for treatment, if any; and (D) No physician-patient privilege shall apply under this rule. (2) The independent medical examiner shall provide the report to the panel, the administrator and the respondent. The report shall be admissible into evidence in the proceedings. (3) The respondent is entitled to be examined by a qualified professional at his or her own expense, but such examiner shall prepare a report in accord with this rule. The respondent shall provide a copy of the report to the administrator within 30 days of the date of its preparation. Failure to provide a timely copy of the report to the grievance

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. The content of a report prepared by an expert(s) pursuant to this paragraph is admissible into evidence in the proceedings unless, within 14 days of delivery of the report, a party objects, in which case either party may subpoena the expert to testify at the hearing at that party's expense.	administrator shall result in the inability of the respondent to offer the report into evidence at any subsequent formal disciplinary proceeding. The report is otherwise admissible into the record.
	(b) Expert's Report	
	The expert's report as required by paragraph (a) shall include:	
	(i) The expert's resume or curriculum vitae;	
	(ii) A statement of facts, and a list of the tests which were administered and the test results;	
	(iii) A diagnosis, prognosis, a statement of limitations on the opinion because of the scope of the examination or testing, and recommendation for treatment, if any; and	
	(iv) No physician-patient privilege shall apply under this rule.	
(2) The hearing panel shall provide notice to the attorney of the proceedings and	(2) The hearing panel shall provide notice to the attorney of the proceedings and	(2) ~~The hearing panel shall~~ When the administrator files a petition to transfer

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
appoint an attorney to represent him or her if he or she is without representation.	appoint an attorney to represent him or her if he or she is without representation.	~~provide notice to the an~~ attorney ~~of the proceedings, and appoint an attorney to represent him or her if he or she is without representation~~ to inactive status, the petition shall be served on respondent according to the provisions of MCR 9.115(C). (3) Upon the request of a party, or on its own motion, and following a finding of good cause, a panel may recommend the appointment of counsel by the board to represent the respondent if he or she is without representation.
(3) If, after a hearing, the hearing panel concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status for an indefinite period and until further order of the board.	(3) If, after a hearing, the hearing panel concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status for an indefinite period and until further order of the board.	(~~3~~4) If, after a hearing, the hearing panel concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status for an indefinite period and until further order of the board.
(4) Pending disciplinary proceedings against the attorney must be held in abeyance.	(4) Pending disciplinary proceedings against the attorney must be held in abeyance.	(~~4~~5) Pending disciplinary proceedings against the attorney shall be administratively closed without prejudice to future prosecution upon the return of the lawyer to active status ~~must be held in abeyance~~.
(5) Proceedings conducted under this subrule are subject to review by the board as provided in MCR 9.118.	(5) Proceedings conducted under this subrule are subject to review by the board as provided in MCR 9.118.	(~~5~~6) Proceedings conducted under this subrule are subject to review by the board as provided in MCR 9.118.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(C) Assertion of Impaired Ability; Probation.	(C) Assertion of Impaired Ability; Probation.	(C) Assertion of Impaired Ability; Probation.
(1) If, in response to a formal complaint filed under subrule 9.115(B), the respondent asserts in mitigation and thereafter demonstrates by a preponderance of the evidence that	(1) If, in response to a formal complaint filed under subrule 9.115(B), the respondent asserts in mitigation and thereafter demonstrates by a preponderance of the evidence that	(1) If, in response to a formal complaint filed under subrule 9.115(B), the respondent asserts in mitigation and thereafter demonstrates by a preponderance of the evidence that
(a) during the period when the conduct which is the subject of the complaint occurred, his or her ability to practice law competently was materially impaired by physical or mental disability or by drug or alcohol addiction,	(a) during the period when the conduct which is the subject of the complaint occurred, his or her ability to practice law competently was materially impaired by physical or mental disability or by drug or alcohol addiction,	(a) during the period when the conduct which is the subject of the complaint occurred, his or her ability to practice law competently was materially impaired by physical or mental disability or by drug or alcohol addiction,
(b) the impairment was the cause of or substantially contributed to that conduct,	(b) the impairment was the cause of or substantially contributed to that conduct,	(b) the impairment was the cause of or substantially contributed to that conduct.
(c) the cause of the impairment is susceptible to treatment, and	(c) the cause of the impairment is susceptible to treatment, and	(c) the cause of the impairment is susceptible to treatment, and
(d) he or she in good faith intends to undergo treatment, and submits a detailed plan for such treatment, the hearing panel, the board, or the Supreme Court may enter an order placing the respondent on probation for a specific period not to exceed 2 years if it specifically finds that an order of probation is not contrary to the public interest.	(d) he or she in good faith intends to undergo treatment, and submits a detailed plan for such treatment, the hearing panel, the board, or the Supreme Court may enter an order placing the respondent on probation for a specific period not to exceed 2 years if it specifically finds that an order of probation is not contrary to the public interest.	(d) he or she in good faith intends to undergo treatment, and submits a detailed plan for such treatment, the hearing panel, the board, or the Supreme Court may enter an order placing the respondent on probation for a specific period not to exceed 3 2 years if it specifically finds that an order of probation is not contrary to the public interest.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(2) If the respondent alleges impairment by physical or mental disability or by drug or alcohol addiction pursuant to subrule (C)(1), the hearing panel may order the respondent to submit to a physical or mental examination by a physician selected by the hearing panel or the board, which physician shall report to the hearing panel or board. The parties may obtain a psychiatric or medical evaluation at their own expense by examiners of their own choosing. No physician-patient privilege shall apply under this rule. The respondent's attorney may be present at an examination. A respondent who fails or refuses to comply with an examination order, or refuses to undergo an examination requested by the administrator, shall not be eligible for probation.	(2) If the respondent alleges impairment by physical or mental disability or by drug or alcohol addiction pursuant to subrule (C)(1), the hearing panel may order the respondent to submit to a physician ~~or a physician selected by the hearing panel or the board, which physician shall report to the hearing panel or board. The parties may obtain a psychiatric or medical evaluation at their own expense by examiners of their own choosing. No physician-patient privilege shall apply under this rule. The respondent's attorney may be present at an examination~~ in accord with the procedure set forth in MCR 9.121(B)(1)(a). The panel may direct that the expense of the examination be paid by the respondent. A respondent who fails or refuses to comply with an examination order, or refuses to undergo an examination requested by the administrator, shall not be eligible for probation.	(2) If the respondent alleges impairment by physical or mental disability or by drug or alcohol addiction pursuant to subrule (C)(1), the hearing panel may order the respondent to submit to a physical or mental examination ~~by a physician selected by the hearing panel or the board, which physician shall report to the hearing panel or board. The parties may obtain a psychiatric or medical evaluation at their own expense by examiners of their own choosing. No physician-patient privilege shall apply under this rule. The respondent's attorney may be present at an examination~~ in accord with the procedure set forth in MCR 9.121(B)(1)(a). The panel may direct that the expense of the examination be paid by the respondent. A respondent who fails or refuses to comply with an examination order, or refuses to undergo an examination requested by the administrator, shall not be eligible for probation.
(3) The probation order may	(3) The probation order ~~may~~	(3) The probation order ~~may~~
(a) specify the treatment the respondent is to undergo,	(a) must specify the treatment the respondent is to undergo,	(a) must specify the treatment the respondent is to undergo,
(b) require the respondent to practice law only under the direct supervision of other attorneys, or	(b) may require the respondent to practice law only under the direct supervision of other attorneys, or	(b) may require the respondent to practice law only under the direct supervision of other attorneys, or

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(c) include any other terms the evidence shows are likely to eliminate the impairment without subjecting the respondent's clients or the public to a substantial risk of harm because the respondent is permitted to continue to practice law during the probation period.	(c) may include any other terms the evidence shows are likely to eliminate the impairment without subjecting the respondent's clients or the public to a substantial risk of harm because the respondent is permitted to continue to practice law during the probation period.	(c) may include any other terms the evidence shows are likely to eliminate the impairment without subjecting the respondent's clients or the public to a substantial risk of harm because the respondent is permitted to continue to practice law during the probation period.
(4) The probation order expires on the date specified in it unless the administrator petitions for, and the hearing panel, board, or court grants, an extension. An extension may not exceed 2 years. A probation order may be dissolved if the respondent demonstrates that the impairment giving rise to the probation order has been removed and that the probation order has been fully complied with, but only one motion to accelerate dissolution of a probation order may be filed during the probation period.	(4) A respondent may be placed on probation for up to 2 years. The probation order expires on the date specified in it unless the administrator petitions for, and the hearing panel, board, or court grants, an extension. An extension may not exceed 2 years. A probation order may be dissolved if the respondent demonstrates that the impairment giving rise to the probation order has been removed and that the probation order has been fully complied with, but only one motion to accelerate dissolution of a probation order may be filed during the probation period.	(4) A respondent may be placed on probation for up to 3 years. The probation order expires on the date specified in it unless the administrator petitions for, and the hearing panel, board, or court grants, an extension. An extension may not exceed 3 years. A probation order may be dissolved if the respondent demonstrates that the impairment giving rise to the probation order has been removed and that the probation order has been fully complied with, but only one motion to accelerate dissolution of a probation order may be filed during the probation period.
(5) On proof that a respondent has violated a probation order, he or she may be suspended or disbarred.	(5) On proof that a respondent has violated a probation order, he or she may be suspended or disbarred.	(5) On proof that a respondent has violated a probation order, he or she may be suspended or disbarred.
(D) Publication of Change in Status. The board must publish in the Michigan Bar Journal a notice of transfer to inactive status. A copy of the notice and the order must be filed and served under MCR 9.118.	(D) Publication of Change in Status. The board must publish in the Michigan Bar Journal a notice of transfer to inactive status. A copy of the notice and the order must be filed and served under MCR 9.118.	(D) Publication of Change in Status. The board must publish in the Michigan Bar Journal a notice of transfer to inactive status. A copy of the notice and the order must be filed and served under MCR 9.118.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(E) Reinstatement. An attorney transferred to inactive status under this rule may not resume active status until reinstated by the board's order and, if inactive 3 years or more, recertified by the Board of Law Examiners. The attorney may petition for reinstatement to active status once a year or at shorter intervals as the board may direct. A petition for reinstatement must be granted by the board on a showing by clear and convincing evidence that the attorney's disability has been removed and that he or she is fit to resume the practice of law. The board may take the action necessary to determine whether the attorney's disability has been removed, including an examination of the attorney by qualified medical experts that the board designates. The board may direct that the expense of the examination be paid by the attorney. If an attorney was transferred to inactive status under subrule 9.121(A) and subsequently has been judicially declared to be competent, the board may dispense with further evidence that the disability has been removed and may order reinstatement to active status on terms it finds proper and advisable, including recertification.	(E) Reinstatement. An attorney transferred to inactive status under this rule may not resume active status until reinstated by the board's order and, if inactive 3 years or more, recertified by the Board of Law Examiners. The attorney may petition for reinstatement to active status once a year or at shorter intervals as the board may direct. A petition for reinstatement must be granted by ~~the board~~ a panel on a showing by clear and convincing evidence that the attorney's disability has been removed and that he or she is fit to resume the practice of law. ~~The board~~ A panel may take the action necessary to determine whether the attorney's disability has been removed, including an examination of the attorney ~~by qualified medical experts that the board designates~~ conducted in accord with the procedure set forth in MCR 9.121(B)(1)(a). The ~~board~~ panel may direct that the expense of the examination be paid by the attorney. If an attorney was transferred to inactive status under subrule 9.121(A) and subsequently has been judicially declared to be competent, ~~the board~~ a panel may dispense with further evidence that the disability has been removed and may order reinstatement to active status on terms it finds proper and advisable, including recertification.	(E) Reinstatement. An attorney transferred to inactive status under this rule may not resume active status until reinstated by the board's order and, if inactive 3 years or more, recertified by the Board of Law Examiners. The attorney may petition for reinstatement to active status once a year or at shorter intervals as the board may direct. A petition for reinstatement must be granted by ~~the board~~ a panel on a showing by clear and convincing evidence that the attorney's disability has been removed, including an examination of the attorney ~~by qualified medical experts that the board designates~~ conducted in accord with the procedure set forth in MCR 9.121(B)(1)(a). ~~The board~~ A panel may take the action necessary to determine whether the attorney's disability has been removed, including an examination of the attorney by qualified medical experts that the board designates. The board may direct that the expense of the examination be paid by the attorney. If an attorney was transferred to inactive status under subrule 9.121(A) and subsequently has been judicially declared to be competent, ~~the board~~ a panel may dispense with further evidence that the disability has been removed and may order reinstatement to active status on terms it finds proper and advisable, including recertification.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(F) Waiver of Privilege. By filing a petition for reinstatement to active status under this rule, the attorney waives the doctor-patient privilege with respect to treatment during the period of his or her disability. The attorney shall disclose the name of every psychiatrist, psychologist, physician, and hospital or other institution by whom or in which the attorney has been examined or treated since the transfer to inactive status. The attorney shall furnish to the board written consent for each to divulge whatever information and records are requested by the board's medical experts.	(F) Waiver of Privilege. By filing a petition for reinstatement to active status under this rule, the attorney waives the doctor-patient privilege with respect to treatment during the period of his or her disability. The attorney shall disclose the name of every psychiatrist, psychologist, physician, and hospital or other institution by whom or in which the attorney has been examined or treated since the transfer to inactive status. The attorney shall furnish to the ~~board~~ panel written consent for each to divulge whatever information and records are requested by the ~~board's~~ panel's medical or psychological experts.	(F) Waiver of Privilege. By filing a petition for reinstatement to active status under this rule, the attorney waives the doctor-patient privilege with respect to treatment during the period of his or her disability. The attorney shall disclose the name of every psychiatrist, psychologist, physician, and hospital or other institution by whom or in which the attorney has been examined or treated since the transfer to inactive status. The attorney shall furnish to ~~the board~~ a panel written consent for each to divulge whatever information and records are requested by the ~~board's~~ panel's medical or psychological experts.
Rule 9.122 Review by Supreme Court	**Rule 9.122** Review by Supreme Court	**Rule 9.122** Review by Supreme Court
(A) Kinds Available; Time for Filing.	(A) Kinds Available; Time for Filing.	(A) Kinds Available; Time for Filing.
(1) A party aggrieved, including the person who made a request for investigation, by a final order of discipline or dismissal entered by the board on review under MCR 9.118, may apply for leave to appeal to the Supreme Court under MCR 7.302 within 28 days after the order is entered. If a motion for reconsideration is filed before the board's order takes effect, the application for leave to appeal to the Supreme Court may be	(1) A party aggrieved, including the ~~person who made a request for investigation~~ complainant, by a final order ~~of discipline or dismissal~~ entered by the board on review under MCR 9.118, may apply for leave to appeal to the Supreme Court under MCR 7.302 within 28 days after the order is entered. If a motion for reconsideration is filed before the board's order takes effect, the application for leave to appeal to the Supreme Court may	(1) A party aggrieved, including the ~~person who made a request for investigation~~ complainant, by a final order ~~of discipline or dismissal~~ entered by the board on review under MCR 9.118, may apply for leave to appeal to the Supreme Court under MCR 7.302 within 28 days after the order is entered. If a motion for reconsideration is filed before the board's order takes effect, the application for leave to appeal to the

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
filed within 28 days after the board enters its order granting or denying reconsideration. (2) If a request for investigation has been dismissed under MCR 9.112(C)(1) or 9.114(A), a party aggrieved by the dismissal may file a complaint in the Supreme Court under MCR 7.304. (B) Rules Applicable. Except as modified by this rule, subchapter 7.300 governs an appeal. (C) Stay of Order. If the discipline order is a suspension of 179 days or less, a stay of the order will automatically issue on the timely filing of an appeal by the respondent. The stay remains effective until conclusion of the appeal or further order of the Supreme Court. The respondent may petition the Supreme Court for a stay pending appeal of other orders of the board. (D) Record on Appeal. The original papers constitute the record on appeal. The board shall certify the original record and file it with the Supreme Court promptly after the briefs of the parties have been filed. The record must include a list of docket entries, a transcript of testimony taken, and all pleadings.	be filed within 28 days after the board enters its order granting or denying reconsideration. (2) If a request for investigation has been dismissed under MCR 9.112(C)(1)(a) or 9.114(A), a party aggrieved by the dismissal may file a complaint in the Supreme Court under MCR 7.304. (B) Rules Applicable. Except as modified by this rule, subchapter 7.300 governs an appeal. (C) Stay of Order. If the discipline order is a suspension of 179 days or less, a stay of the order will automatically issue on the timely filing of an appeal by the respondent. The stay remains effective ~~until~~ for 21 days following the conclusion of the appeal or further order of the Supreme Court. The respondent may petition the Supreme Court for a stay pending appeal of other orders of the board. (D) Record on Appeal. The original papers constitute the record on appeal. The board shall certify the original record and file it with the Supreme Court promptly after the briefs of the parties have been filed. The record must include a list of docket entries, a transcript of testimony taken, and all pleadings.	Supreme Court may be filed within 28 days after the board enters its order granting or denying reconsideration. (2) If a request for investigation has been dismissed under MCR 9.112(C)(1)(a) or 9.114(A), a party aggrieved by the dismissal may file a complaint in the Supreme Court under MCR 7.304. (B) Rules Applicable. Except as modified by this rule, subchapter 7.300 governs an appeal. (C) Stay of Order. If the discipline order is a suspension of 179 days or less, a stay of the order will automatically issue on the timely filing of an appeal by the respondent. The stay remains effective ~~until~~ for 21 days following the conclusion of the appeal or further order of the Supreme Court. The respondent may petition the Supreme Court for a stay pending appeal of other orders of the board. (D) Record on Appeal. The original papers constitute the record on appeal. The board shall certify the original record and file it with the Supreme Court promptly after the briefs of the parties have been filed. The record must include a list of docket entries, a transcript of testimony taken, and all pleadings.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
exhibits, briefs, findings of fact, and orders in the proceeding. If the record contains material protected, the protection continues unless otherwise ordered by the Supreme Court.	exhibits, briefs, findings of fact, and orders in the proceeding. If the record contains material protected, the protection continues unless otherwise ordered by the Supreme Court.	exhibits, briefs, findings of fact, and orders in the proceeding. If the record contains material protected, the protection continues unless otherwise ordered by the Supreme Court.
(E) Disposition. The Supreme Court may make any order it deems appropriate, including dismissing the appeal. The parties may stipulate to dismiss the appeal with prejudice.	(E) Disposition. The Supreme Court may make any order it deems appropriate, including dismissing the appeal. The parties may stipulate to dismiss the appeal with prejudice.	(E) Disposition. The Supreme Court may make any order it deems appropriate, including dismissing the appeal. The parties may stipulate to dismiss the appeal with prejudice.
Rule 9.123 Eligibility for Reinstatement	**Rule 9.123** Eligibility for Reinstatement	**Rule 9.123** Eligibility for Reinstatement
(A) Suspension, 179 Days or Less. An attorney whose license has been suspended for 179 days or less is automatically reinstated by filing with the Supreme Court clerk, the board, and the administrator an affidavit showing that the attorney has fully complied with the terms and conditions of the suspension order. A false statement contained in the affidavit is ground for disbarment.	(A) Suspension, 179 Days or Less. An attorney whose license has been suspended for 179 days or less is automatically reinstated by filing with the Supreme Court clerk, the board, and the administrator an affidavit showing that the attorney has fully complied with the terms and conditions of the suspension order. A materially false statement contained in the affidavit is ground for disbarment.	(A) Suspension, 179 Days or Less. An attorney whose license has been suspended for 179 days or less is automatically reinstated by filing with the Supreme Court clerk, the board, and the administrator an affidavit showing that the attorney has fully complied with the terms and conditions of the suspension order. A materially false statement contained in the affidavit is ground for disbarment.
(B) Revocation or Suspension More Than 179 Days. An attorney whose license to practice law has been revoked or suspended for more than 179 days is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124 and has established by clear	(B) ~~Revocation~~ Disbarment or Suspension More Than 179 Days. An attorney whose license to practice law has been revoked or suspended for more than 179 days is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124 and has established by	(B) ~~Revocation~~ Disbarment or Suspension More Than 179 Days. An attorney whose license to practice law has been revoked or suspended for more than 179 days is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
and convincing evidence that:	clear and convincing evidence that:	9.124 and has established by clear and convincing evidence that:
(1) he or she desires in good faith to be restored to the privilege of practicing law in Michigan;	(1) he or she desires in good faith to be restored to the privilege of practicing law in Michigan;	(1) he or she desires in good faith to be restored to the privilege of practicing law in Michigan;
(2) the term of the suspension ordered has elapsed or 5 years have elapsed since revocation of the license;	(2) the term of the suspension ordered has elapsed or 5 years have elapsed since ~~his or her revocation of the license~~ disbarment or resignation;	(2) the term of the suspension ordered has elapsed or 5 years have elapsed since ~~his or her revocation of the license~~ disbarment or resignation;
(3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension or revocation;	(3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension or ~~revocation~~ disbarment;	(3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension or ~~revocation~~ disbarment;
(4) he or she has complied fully with the order of discipline;	(4) he or she has complied fully with the order of discipline;	(4) he or she has complied fully with the order of discipline;
(5) his or her conduct since the order of discipline has been exemplary and above reproach;	(5) his or her conduct since the order of discipline has been exemplary and above reproach;	(5) his or her conduct since the order of discipline has been exemplary and above reproach;
(6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;	(6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;	(6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;
(7) taking into account all of the attorney's past conduct, including the nature of the misconduct which led to the revocation or suspension, he or she nevertheless can	(7) taking into account all of the attorney's past conduct, including the nature of the misconduct which led to the revocation or suspension, he or she	(7) taking into account all of the attorney's past conduct, including the nature of the misconduct which led to the revocation or suspension, he or she

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court;	nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court;	nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court;
(8) he or she is in compliance with the requirements of subrule (C), if applicable; and	(8) he or she is in compliance with the requirements of subrule (C), if applicable; and	(8) he or she is in compliance with the requirements of subrule (C), if applicable; and
(9) he or she has reimbursed the client security fund of the State Bar of Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his or her conduct. Failure to fully reimburse as agreed is ground for revocation of a reinstatement.	(9) he or she has reimbursed the client security fund of the State Bar of Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his or her conduct. Failure to fully reimburse as agreed is ground for ~~revocation~~ vacating an order of a reinstatement.	(9) he or she has reimbursed the client security fund of the State Bar of Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his or her conduct. Failure to fully reimburse as agreed is ground for ~~revocation~~ vacating an order of a reinstatement.
(C) Reinstatement After Three Years. An attorney who, as a result of disciplinary proceedings, resigns, is disbarred, or is suspended for any period of time, and who does not practice law for 3 years or more, whether as the result of the period of discipline or voluntarily, must be recertified by the Board of Law Examiners before the attorney may be reinstated to the practice of law.	(C) Reinstatement After Three Years. An attorney who, as a result of disciplinary proceedings, resigns, is disbarred, or is suspended for any period of time, and who does not practice law for 3 years or more, whether as the result of the period of discipline or voluntarily, must be recertified by the Board of Law Examiners before the attorney may be reinstated to the practice of law.	(C) Reinstatement After Three Years. An attorney who, as a result of disciplinary proceedings, resigns, is disbarred, or is suspended for any period of time, and who does not practice law for 3 years or more, whether as the result of the period of discipline or voluntarily, must be recertified by the Board of Law Examiners before the attorney may be reinstated to the practice of law.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(D) Petition for Reinstatement; Filing Limitations.	(D) Petition for Reinstatement; Filing Limitations.	(D) Petition for Reinstatement; Filing Limitations.
(1) Except as provided in subrule (D)(3), an attorney whose license to practice law has been suspended may not file a petition for reinstatement earlier than 56 days before the term of suspension ordered has fully elapsed.	(1) Except as provided in subrule (D)(3), an attorney whose license to practice law has been suspended may not file a petition for reinstatement earlier than 56 days before the term of suspension ordered has fully elapsed.	(1) Except as provided in subrule (D)(3), an attorney whose license to practice law has been suspended may not file a petition for reinstatement earlier than 56 days before the term of suspension ordered has fully elapsed.
(2) An attorney whose license to practice law has been revoked may not file a petition for reinstatement until 5 years have elapsed since revocation of the license.	(2) An attorney whose license to practice law has been revoked or who has resigned may not file a petition for reinstatement until 5 years have elapsed since ~~revocation of the license~~ the attorney's resignation or disbarment.	(2) An attorney whose license to practice law has been revoked or who has resigned may not file a petition for reinstatement until 5 years have elapsed since ~~revocation of the license~~ the attorney's resignation or disbarment.
(3) An attorney whose license to practice law has been suspended because of conviction of a felony for which a term of incarceration was imposed may not file a petition for reinstatement until six months after completion of the sentence, including any period of parole.	(3) An attorney whose license to practice law has been suspended because of conviction of a felony for which a term of incarceration was imposed may not file a petition for reinstatement until six months after completion of the sentence, ~~including any period of parole.~~	(3) An attorney whose license to practice law has been suspended because of conviction of a felony for which a term of incarceration was imposed may not file a petition for reinstatement until six months after completion of the sentence, including any period of parole.
(4) An attorney whose license to practice law has been revoked or suspended and who has been denied reinstatement may not file a new petition for reinstatement until at least 180 days from the effective date of the most recent hearing panel order granting or denying reinstatement.	(4) An attorney ~~whose license to practice law has been revoked~~ who has been disbarred or suspended and who has been denied reinstatement may not file a new petition for reinstatement until at least 180 days from the effective date of the most recent hearing panel order granting or denying reinstatement.	(4) An attorney ~~whose license to practice law has been revoked~~ who has been disbarred or suspended and who has been denied reinstatement may not file a new petition for reinstatement until at least ~~180 days~~ 1 year from the effective date of the most recent hearing panel order granting or denying reinstatement.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
Rule 9.124 Procedure for Reinstatement	**Rule 9.124** Procedure for Reinstatement	**Rule 9.124** Procedure for Reinstatement
(A) Filing of Petition. An attorney petitioning for reinstatement shall file the original petition for reinstatement with the Supreme Court clerk and a copy with the board and the commission.	(A) Filing of Petition. An attorney petitioning for reinstatement shall file the original petition for reinstatement with the Supreme Court clerk and a copy with the board and the commission.	(A) Filing of Petition. An attorney petitioning for reinstatement shall file the original petition for reinstatement with the Supreme Court clerk and a copy with the board and the commission.
(B) Petitioner's Responsibilities.	(B) Petitioner's Responsibilities.	(B) Petitioner's Responsibilities.
(1) Separately from the petition for reinstatement, the petitioner must serve only upon the administrator a personal history affidavit. The affidavit is to become part of the administrator's investigative file and may not be disclosed to the public except under the provisions of MCR 9.126. The following information must be attached to or contained in the affidavit:	(1) Separately from the petition for reinstatement, the petitioner must serve only upon the administrator a personal history affidavit. The affidavit is to become part of the administrator's investigative file and may not be disclosed to the public except under the provisions of MCR 9.126. The ~~following information~~ affidavit must ~~be attached to or contained in the affidavit~~ the following information:	(1) Separately from the petition for reinstatement, the petitioner must serve only upon the administrator a personal history affidavit. The affidavit is to become part of the administrator's investigative file and may not be disclosed to the public except under the provisions of MCR 9.126. The ~~following information~~ affidavit must ~~be attached to or contained in the affidavit~~ the following information:
(a) every residence address since the date of disqualification from the practice of law;	(a) every residence address since the date of disqualification from the practice of law;	(a) every residence address since the date of disqualification from the practice of law;
(b) employment history since the time of disqualification, including the nature of employment, the name and address of every employer, the duration of such employment, and the name of the petitioner's immediate supervisor at each place of employment; if requested by the	(b) employment history since the time of disqualification, including the nature of employment, the name and address of every employer, the duration of such employment, and the name of the petitioner's immediate supervisor at each place of employment; if requested by the	(b) employment history since the time of disqualification, including the nature of employment, the name and address of every employer, the duration of such employment, and the name of the petitioner's immediate supervisor at each place of employment; if requested by the

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
grievance administrator, the petitioner must provide authorization to obtain a copy of the petitioner's personnel file from the employer;	grievance administrator, the petitioner must provide authorization to obtain a copy of the petitioner 's personnel file from the employer;	grievance administrator, the petitioner must provide authorization to obtain a copy of the petitioner 's personnel file from the employer;
(c) a copy of a current driver's license;	(c) a copy of a current driver's license;	(c) a copy of a current driver's license;
(d) any continuing legal education in which the petitioner participated during the period of disqualification from the practice of law;	(d) any continuing legal education in which the petitioner participated during the period of disqualification from the practice of law;	(d) any continuing legal education in which the petitioner participated during the period of disqualification from the practice of law;
(e) bank account statements, from the date of disqualification until the filing of the petition for reinstatement, for each and every bank account in which petitioner is named in any capacity;	(e) bank account statements, from the date of disqualification until the filing of the petition for reinstatement, for each and every bank account in which petitioner is named in any capacity;	(e) bank account statements, from the date of disqualification until the filing of the petition for reinstatement, for each and every bank account in which petitioner is named in any capacity;
(f) copies of the petitioner's personal and business federal, state, and local tax returns from the date of disqualification until the filing of the petition for reinstatement, and if the petitioner owes outstanding income taxes, interest, and penalties, the petitioner must provide a current statement from the taxation authority of the current amount due; if requested by the grievance administrator, the petitioner must provide a waiver granting the grievance administrator authority to obtain information from the tax authority;	(f) copies of the petitioner 's personal and business federal, state, and local tax returns from the date of disqualification until the filing of the petition for reinstatement, and if the petitioner owes outstanding income taxes, interest, and penalties, the petitioner must provide a current statement from the taxation authority of the current amount due; if requested by the grievance administrator, the petitioner must provide a waiver granting the grievance administrator authority to obtain information from the tax authority;	(f) copies of the petitioner 's personal and business federal, state, and local tax returns from the date of disqualification until the filing of the petition for reinstatement, and if the petitioner owes outstanding income taxes, interest, and penalties, the petitioner must provide a current statement from the taxation authority of the current amount due; if requested by the grievance administrator, the petitioner must provide a waiver granting the grievance administrator authority to obtain information from the tax authority;
(g) any and all professional or	(gany and all professional or	(g) any and all professional or

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
occupational licenses obtained or maintained during the period of disqualification and whether any were suspended or revoked;	occupational licenses obtained or maintained during the period of disqualification and whether any were suspended or revoked;	occupational licenses obtained or maintained during the period of disqualification and whether any were suspended or revoked;
(h) any and all names used by petitioner since the time of disqualification;	(h) any and all names used by petitioner since the time of disqualification;	(h) any and all names used by petitioner since the time of disqualification;
(i) petitioner's place and date of birth;	(i) petitioner's place and date of birth;	(i) petitioner's place and date of birth;
(j) petitioner's social security number;	(j) petitioner's social security number;	(j) petitioner's social security number;
(k) whether, since the time of disqualification, petitioner was a party or a witness in any civil case, and the title, docket number, and court in which ~~such~~ the case occurred;	(k) whether, since the time of disqualification, petitioner was a party or a witness in any civil case, and the title, docket number, and court in which ~~such~~ the case occurred;	(k) whether, since the time of disqualification, petitioner was a party or a witness in any civil case, and the title, docket number, and court in which the ~~such~~ case occurred;
(l) whether the petitioner was a party to any civil case, including the title, docket number, and court in which such case was filed; the petitioner must provide copies of the complaints and any dispositional orders or judgments, including settlement agreements, in such cases;	(l) whether the petitioner was a party to any civil case, including the title, docket number, and court in which such case was filed; the petitioner must provide copies of the complaints and any dispositional orders or judgments, including settlement agreements, in such cases;	(l) whether the petitioner was a party to any civil case, including the title, docket number, and court in which such case was filed; the petitioner must provide copies of the complaints and any dispositional orders or judgments, including settlement agreements, in such cases;
(m) whether the petitioner was a defendant or a witness in any criminal case, and the title, docket number, and court in which such case was filed; the petitioner must provide copies of the indictments or complaints and any dispositional orders or judgments of conviction in cases in which	(m) whether the petitioner was a defendant or witness in any criminal case, and the title, docket number, and court in which such case was filed; the petitioner must provide copies of the indictments or complaints and any dispositional orders or judgments of conviction in cases in which	(m) whether the petitioner was a defendant or witness in any criminal case, and the title, docket number, and court in which such case was filed; the petitioner must provide copies of the indictments or complaints and any dispositional orders or judgments of

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
the petitioner was a defendant;	the petitioner was a defendant;	conviction in cases in which the petitioner was a defendant;
(n) whether the petitioner was subject to treatment or counseling for mental or emotional impairments, or for substance abuse or gambling addictions since the time of disqualification; if so, the petitioner must provide a current statement from the petitioner's service provider setting forth an evaluative conclusion regarding the petitioner's impairment(s), the petitioner's treatment records, and prognosis for recovery.	(n) whether the petitioner was subject to treatment or counseling for mental or emotional impairments, or for substance abuse or gambling addictions since the time of disqualification; if so, the petitioner must provide a current statement from the petitioner's service provider setting forth an evaluative conclusion regarding the petitioner's impairment(s), the petitioner's treatment records, and prognosis for recovery.	(n) whether the petitioner was subject to treatment or counseling for mental or emotional impairments, or for substance abuse or gambling addictions since the time of disqualification; if so, the petitioner must provide a current statement from the petitioner's service provider setting forth an evaluative conclusion regarding the petitioner's impairment(s), the petitioner's treatment records, and prognosis for recovery.
(2) The petitioner must, contemporaneously with the filing of the petition for reinstatement and service on the administrator of the personal history affidavit, remit	(2) The petitioner must, contemporaneously with the filing of the petition for reinstatement and service on the administrator of the personal history affidavit, remit	(2) The petitioner must, contemporaneously with the filing of the petition for reinstatement and service on the administrator of the personal history affidavit, remit
(a) to the administrator the fee for publication of a reinstatement notice in the Michigan Bar Journal.	(a) to the administrator the fee for publication of a reinstatement notice in the Michigan Bar Journal.	(a) to the administrator the fee for publication of a reinstatement notice in the Michigan Bar Journal.
(b) to the board the basic administrative costs required under MCR 9.128(B)(1)	(b) to the board the basic administrative costs required under MCR 9.128(B)(1)	(b) to the board the basic administrative costs required under MCR 9.128(B)(1)
(i) an administrative cost of $750 where the discipline imposed was a suspension of less than 3 years;	(i) an administrative cost of $750 where the discipline imposed was a suspension of less than 3 years;	(i) an administrative cost of $750 where the discipline imposed was a suspension of less than 3 years;
(ii) an administrative cost of $1,500 where the discipline imposed was a suspension	(ii) an administrative cost of $1,500 where the discipline imposed was a suspension	(ii) an administrative cost of $1,500 where the discipline imposed was a

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
of 3 years or more or disbarment.	of 3 years or more or disbarment.	suspension of 3 years or more or disbarment.
(3) If the petition is facially sufficient and the petitioner has provided proof of service of the personal history affidavit upon the administrator and paid the publication fee required by subrule (B)(2), the board shall assign the petition to a hearing panel. Otherwise, the board may dismiss the petition without prejudice.	(3) If the petition is facially sufficient and the petitioner has provided proof of service of the personal history affidavit upon the administrator and paid the publication fee required by subrule (B)(2), the board shall assign the petition to a hearing panel. Otherwise, the board may dismiss the petition without prejudice, on its own motion or the motion of the administrator.	(3) If the petition is facially sufficient and the petitioner has provided proof of service of the personal history affidavit upon the administrator and paid the publication fee required by subrule (B)(2), the board shall assign the petition to a hearing panel. Otherwise, the board may dismiss the petition without prejudice, on its own motion or the motion of the administrator.
(4) A petitioner who files the petition before the term of suspension ordered has fully elapsed must file an updated petition and serve upon the administrator an updated personal history affidavit within 14 days after the term of suspension ordered has fully elapsed. All petitioners remain under a continuing obligation to provide updated information bearing upon the petition or the personal history affidavit.	(4) A petitioner who files the petition before the term of suspension ordered has fully elapsed must file an updated petition and serve upon the administrator an updated personal history affidavit within 14 days after the term of suspension ordered has fully elapsed. All petitioners remain under a continuing obligation to provide updated information bearing upon the petition or the personal history affidavit.	(4) A petitioner who files the petition before the term of suspension ordered has fully elapsed must file an updated petition and serve upon the administrator an updated personal history affidavit within 14 days after the term of suspension ordered has fully elapsed. All petitioners remain under a continuing obligation to provide updated information bearing upon the petition or the personal history affidavit.
(5) The petitioner must cooperate fully in the investigation by the administrator into the petitioner's eligibility for reinstatement by promptly providing any information requested. If requested, the petitioner must participate in a recorded interview and answer fully and fairly under oath all questions about eligibility for	(5) The petitioner must cooperate fully in the investigation by the administrator into the petitioner's eligibility for reinstatement by promptly providing any information requested. If requested, the petitioner must participate in a recorded interview and answer fully and fairly under oath all questions about eligibility for	(5) The petitioner must cooperate fully in the investigation by the administrator into the petitioner's eligibility for reinstatement by promptly providing any information requested. If requested, the petitioner must participate in a recorded interview and answer fully and fairly under oath all questions about eligibility

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
reinstatement.	reinstatement.	for reinstatement.
(C) Administrator's Responsibilities.	(C) Administrator's Responsibilities.	(C) Administrator's Responsibilities.
Within 14 days after the commission receives its copy of the petition for reinstatement, the administrator shall submit to the Michigan Bar Journal for publication a notice briefly describing the nature and date of the discipline, the misconduct for which the petitioner was disciplined, and the matters required to be proved for reinstatement.	(1) Within 14 days after the commission receives its copy of the petition for reinstatement, the administrator shall submit to the Michigan Bar Journal for publication a notice briefly describing the nature and date of the discipline, the misconduct for which the petitioner was disciplined, and the matters required to be proved for reinstatement.	(1) Within 14 days after the commission receives its copy of the petition for reinstatement, the administrator shall submit to the Michigan Bar Journal for publication a notice briefly describing the nature and date of the discipline, the misconduct for which the petitioner was disciplined, and the matters required to be proved for reinstatement.
The administrator shall investigate the petitioner's eligibility for reinstatement before a hearing on it, report the findings in writing to the board and the hearing panel within 56 days of the date the board assigns the petition to the hearing panel, and serve a copy on the petitioner.	(2) The administrator shall investigate the petitioner's eligibility for reinstatement before a hearing on it, report the findings in writing to the board and the hearing panel within 56 days of the date the board assigns the petition to the hearing panel, and serve a copy on the petitioner.	(2) The administrator shall investigate the petitioner's eligibility for reinstatement before a hearing on it, report the findings in writing to the board and the hearing panel within 56 days of the date the board assigns the petition to the hearing panel, and serve a copy on the petitioner.
For good cause, the hearing panel may allow the administrator to file the report at a later date, but in no event later than 7 days before the hearing.	(a) For good cause, the hearing panel may allow the administrator to file the report at a later date, but in no event later than 7 days before the hearing.	(a) For good cause, the hearing panel may allow the administrator to file the report at a later date, but in no event later than 7 days before the hearing.
The report must summarize the facts of all previous misconduct and the available evidence bearing on the petitioner's eligibility for reinstatement. The report is part of the record but does not restrict the parties in the presentation of relevant	(b) The report must summarize the facts of all previous misconduct and the available evidence bearing on the petitioner's eligibility for reinstatement. The report is part of the record but does not restrict the parties in the presentation	(b) The report must summarize the facts of all previous misconduct and the available evidence bearing on the petitioner's eligibility for reinstatement. The report is part of the record but does not restrict the parties in the presentation

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
evidence at the hearing. Any evidence omitted from the report or received by the administrator subsequent to the filing of the report must be disclosed promptly to the hearing panel and the petitioner.	of additional relevant evidence at the hearing. Any evidence omitted from the report or received by the administrator ~~subsequent to~~ after the filing of the report must be disclosed promptly to the hearing panel and ~~the petitioner~~ to the opposing party.	of additional relevant evidence at the hearing. Any evidence omitted from the report or received by the administrator ~~subsequent to~~ after the filing of the report must be disclosed promptly to the hearing panel and ~~the petitioner~~ to the opposing party.
(D) Hearing on Petition. A reinstatement hearing may not be held earlier than 28 days after the administrator files the investigative report with the hearing panel unless the hearing panel has extended the deadline for filing the report. The proceeding on a petition for reinstatement must conform as nearly as practicable to a hearing on a complaint. The petitioner shall appear personally before the hearing panel for cross-examination by the administrator and the hearing panel and answer fully and fairly under oath all questions regarding eligibility for reinstatement. The administrator and the petitioner may call witnesses or introduce evidence bearing upon the petitioner's eligibility for reinstatement. The hearing panel must enter an order granting or denying reinstatement and make a written report signed by the chairperson, including a transcript of the testimony taken, pleadings, exhibits and briefs, and its findings of fact. A reinstatement order may grant reinstatement subject to conditions that are relevant to the	(D) Hearing on Petition. A reinstatement hearing may not be held earlier than 28 days after the administrator files the investigative report with the hearing panel unless the hearing panel has extended the deadline for filing the report. The proceeding on a petition for reinstatement must conform as nearly as practicable to a hearing on a complaint. The petitioner shall appear personally before the hearing panel for cross-examination by the administrator and the hearing panel and answer fully and fairly under oath all questions regarding eligibility for reinstatement. The administrator and the petitioner may call witnesses or introduce evidence bearing upon the petitioner's eligibility for reinstatement. The hearing panel must enter an order granting or denying reinstatement and make a written report signed by the chairperson, including a transcript of the testimony taken, pleadings, exhibits and briefs, and its findings of fact. A reinstatement order may grant reinstatement subject to conditions that are relevant to the	(D) Hearing on Petition. A reinstatement hearing may not be held earlier than 28 days after the administrator files the investigative report with the hearing panel unless the hearing panel has extended the deadline for filing the report. The proceeding on a petition for reinstatement must conform as nearly as practicable to a hearing on a complaint. The petitioner shall appear personally before the hearing panel for cross-examination by the administrator and the hearing panel and answer fully and fairly under oath all questions regarding eligibility for reinstatement. The administrator and the petitioner may call witnesses or introduce evidence bearing upon the petitioner's eligibility for reinstatement. The hearing panel must enter an order granting or denying reinstatement and make a written report signed by the chairperson, including a transcript of the testimony taken, pleadings, exhibits and briefs, and its findings of fact. A reinstatement order may grant reinstatement subject to

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
established misconduct or otherwise necessary to insure the integrity of the profession, to protect the public, and to serve the interests of justice. The report and order must be filed and served under MCR 9.118(F). (E) Review. Review is available under the rules governing review of other hearing panel orders. **Rule 9.125** Immunity A person is absolutely immune from suit for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or proceeding on alleged misconduct or reinstatement. The administrator, legal counsel, investigators, members of hearing panels, the commission, the board, and their staffs are absolutely immune from suit for conduct arising out of the performance of their duties.	established misconduct or otherwise necessary to insure the integrity of the profession, to protect the public, and to serve the interests of justice. The report and order must be filed and served under MCR 9.118(F). (E) Review. Review is available under the rules governing review of other hearing panel orders. **Rule 9.125** Immunity A person is absolutely immune from suit for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or proceeding on alleged misconduct or reinstatement. The administrator, legal counsel, investigators, members of hearing panels, masters, receivers appointed under MCR 9.119(G), voluntary investigators, fee arbitrators, mentors, practice monitors, the commission, the board, and their staffs are absolutely immune from suit for conduct arising out of the performance of their duties. A medical or psychological expert who	conditions that are relevant to the established misconduct or otherwise necessary to insure the integrity of the profession, to protect the public, and to serve the interests of justice. The report and order must be filed and served under MCR 9.118(F). (E) Review. Review is available under the rules governing review of other hearing panel orders. The administrator may request a stay of an order granting eligibility for reinstatement. **Rule 9.125** Immunity A person is absolutely immune from suit for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or proceeding on alleged misconduct or reinstatement. The administrator, legal counsel, investigators, members of hearing panels, masters, receivers appointed under MCR 9.119(G), voluntary investigators, fee arbitrators, mentors, practice monitors, the commission, the board, and their staffs are absolutely immune from suit for conduct arising out of the performance of their duties. A medical or psychological expert who

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	administers testing or provides a report pursuant to MCR 9.114(C) or MCR 9.121 (both rules as amended under these proposals) is absolutely immune from suit for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or formal disciplinary proceeding.	administers testing or provides a report pursuant to MCR 9.114(C) or MCR 9.121 (both rules as amended under these proposals) is absolutely immune from suit for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or formal disciplinary proceeding.
Rule 9.126 Open Hearings; Confidential Files and Records	**Rule 9.126** Open Hearings; Privileged, Confidential Files and Records	**Rule 9.126** Open Hearings; Privileged, Confidential Files and Records
(A) Investigations. Except as provided in these rules, investigations by the administrator or the staff may not be made public. At the respondent's option, final disposition of a request for investigation not resulting in formal charges may be made public. In addition, any interested person may inspect the request for investigation and the respondent's answer thereto if a formal complaint has been filed.	(A) Investigations. Except as provided in these rules, investigations by the administrator or the staff are privileged from disclosure, confidential, and may not be made public. At the respondent's option, final disposition of a request for investigation not resulting in formal charges may be made public. In addition, any interested person may inspect the request for investigation and the respondent's answer thereto if a ~~formal complaint~~ disciplinary proceeding has been filed.	(A) Investigations. Except as provided in these rules, investigations by the administrator or the staff are privileged from disclosure, confidential, and may not be made public. At the respondent's option, final disposition of a request for investigation not resulting in formal charges may be made public. In addition, any interested person may inspect the request for investigation and the respondent's answer thereto if a ~~formal complaint~~ disciplinary proceeding has been filed.
(B) Hearings. Hearings before a hearing panel and the board must be open to the public, but not their deliberations.	(B) Hearings. Hearings before a hearing panel and the board must be open to the public, but not their deliberations.	(B) Hearings. Hearings before a hearing panel and the board must be open to the public, but not their deliberations.
(C) Papers. Formal pleadings, reports, findings, recommendations, discipline,	(C) Papers. Formal pleadings, reports, findings, recommendations, discipline,	(C) Papers. Formal pleadings, reports, findings, recommendations, discipline,

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
reprimands, transcripts, and orders resulting from hearings must be open to the public. A personal history affidavit filed pursuant to MCR 9.124(B)(1) is a confidential document that is not open to the public. This subrule does not apply to a request for a disclosure authorization submitted to the board or the Supreme Court pursuant to subrules (D)(7) or (E)(5).	reprimands, transcripts, and orders resulting from hearings must be open to the public. A personal history affidavit filed pursuant to MCR 9.124(B)(1) is a confidential document that is not open to the public. This subrule does not apply to a request for a disclosure authorization submitted to the board or the Supreme Court pursuant to subrules (D)(7) or (E)(5).	reprimands, transcripts, and orders resulting from hearings must be open to the public. A personal history affidavit filed pursuant to MCR 9.124(B)(1) is a confidential document that is not open to the public. This subrule does not apply to a request for a disclosure authorization submitted to the board or the Supreme Court pursuant to subrules (D)(7) or (E)(5).
(D) Other Records. Other files and records of the board, the commission, the administrator, legal counsel, hearing panels and their members, and the staff of each may not be examined by or disclosed to anyone except	(D) Other Records. Other files and records of the board, the commission, the administrator, legal counsel, hearing panels and their members, and the staff of each may not be examined by or disclosed to anyone except	(D) Other Records. Other files and records of the board, the commission, the administrator, legal counsel, hearing panels and their members, and the staff of each may not be examined by or disclosed to anyone except
(1) the commission,	(1) the commission,	(1) the commission,
(2) the administrator,	(2) the administrator,	(2) the administrator,
(3) the respondent as provided under MCR 9.115(F)(4),	(3) the respondent as provided under MCR 9.115(F)(4),	(3) the respondent as provided under MCR 9.115(F)(4),
		(4) a respondent's employer as provided under MCR 9.114(D),
(4) members of hearing panels or the board,	(4) members of hearing panels or the board,	(45) members of hearing panels or the board,
(5) authorized employees,	(5) authorized employees,	(56) authorized employees,
(6) the Supreme Court, or	(6) the Supreme Court, or	(67) the Supreme Court, or

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(7) other persons who are expressly authorized by the board or the Supreme Court. If a disclosure is made to the Supreme Court, the board, or a hearing panel, the information must also be disclosed to the respondent. (E) Other Information. Notwithstanding any prohibition against disclosure set forth in this rule or elsewhere, the commission shall disclose the substance of information concerning attorney or judicial misconduct to the Judicial Tenure Commission, upon request. The commission also may make such disclosure to the Judicial Tenure Commission, absent a request, and to: (1) the State Bar of Michigan Client Security Fund. (2) the State Bar of Michigan Committee on Judicial Qualifications.	(7) other persons who are expressly authorized by the board or the Supreme Court. If a disclosure is made to the Supreme Court, the board, or a hearing panel, except as it relates to a pending investigation, the information must also be disclosed to the respondent unless the court otherwise orders. (E) Other Information. Notwithstanding any prohibition against disclosure set forth in this rule or elsewhere, the commission shall disclose the substance of information concerning attorney or judicial misconduct to the Judicial Tenure Commission, upon request. The commission also may make such disclosure to the Judicial Tenure Commission, absent a request, and to: (1) the State Bar of Michigan Client Security Fund; (2) the State Bar of Michigan; (a) Committee on Judicial Qualifications; (b) Lawyers and Judges Assistance Program;	(78) other persons who are expressly authorized by the board or the Supreme Court. If a disclosure is made to the Supreme Court, the board, or a hearing panel, except as it relates to an investigation, the information must also be disclosed to the respondent unless the court otherwise orders. (E) Other Information. Notwithstanding any prohibition against disclosure set forth in this rule or elsewhere, the commission shall disclose the substance of information concerning attorney or judicial misconduct to the Judicial Tenure Commission, upon request. The commission also may make such disclosure to the Judicial Tenure Commission, absent a request, and to: (1) the State Bar of Michigan Client Security Fund; (2) the State Bar of Michigan; (a) Committee on Judicial Qualifications; (b) Lawyers and Judges Assistance Program;

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	(c) District and Standing Committees on Character and Fitness; or,	(c) District and Standing Committees on Character and Fitness; or,
	(d) Unauthorized Practice of Law Committee,	(d) Unauthorized Practice of Law Committee,
(3) any court-authorized attorney disciplinary or admissions agency; or	(3) any court-authorized attorney disciplinary or admissions agency, ~~or~~ including any federal district court or federal disciplinary agency considering the licensing of attorneys in its jurisdiction,	(3) any court-authorized attorney disciplinary or admissions agency, ~~or~~ including any federal district court or federal disciplinary agency considering the licensing of attorneys in its jurisdiction,
	(4) the Michigan Appellate Assigned Counsel System,	(4) the Michigan Appellate Assigned Counsel System,
		(5) any Michigan court considering the appointment of a lawyer in a pending matter as house counsel, or as a standing appointment,
	(5) a lawyer representing the respondent in an unrelated disciplinary investigation or proceeding;	(6) a lawyer representing the respondent in an unrelated disciplinary investigation or proceeding;
	(6) law enforcement agencies; or	(7) law enforcement agencies; or
(4) other persons who are expressly authorized by the board or the Supreme Court.	(47) other persons who are expressly authorized by the board or the Supreme Court.	(48) other persons who are expressly authorized by the board or the Supreme Court.
(F) Summary of Disclosures. The board shall include in its annual report to the Supreme Court an accounting of all requests for disclosure that have been filed	~~(F) Summary of Disclosures. The board shall include in its annual report to the Supreme Court an accounting of all~~	~~(F) Summary of Disclosures. The board shall include in its annual report to the Supreme Court an accounting of all~~

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
with the board pursuant to subrules (D)(7) and (E)(4). The accounting shall include the board's disposition of each request.	~~requests for disclosure that have been filed with the board pursuant to subrules (D)(7) and (E)(4). The accounting shall include the board's disposition of each request.~~	~~requests for disclosure that have been filed with the board pursuant to subrules (D)(7) and (E)(4). The accounting shall include the board's disposition of each request.~~
Rule 9.127 Enforcement	**Rule 9.127** Enforcement	**Rule 9.127** Enforcement
(A) Interim Suspension. The Supreme Court, the board, or a hearing panel may order the interim suspension of a respondent who fails to comply with its lawful order. The suspension shall remain in effect until the respondent complies with the order or no longer has the power to comply. If the respondent is ultimately disciplined, the respondent shall not receive credit against the disciplinary suspension or disbarment for any time of suspension under this rule. All orders of hearing panels under this rule shall be reviewable immediately under MCR 9.118. All orders of the board under this rule shall be appealable immediately under MCR 9.122. The reviewing authority may issue a stay pending review or appeal.	(A) Interim Suspension. The Supreme Court, the board, or a hearing panel may order the interim suspension of a respondent who fails to comply with its lawful order. The suspension shall remain in effect until the respondent complies with the order or no longer has the power to comply. If the respondent is ultimately disciplined, the respondent shall not receive credit against the disciplinary suspension or disbarment for any time of suspension under this rule. All orders of hearing panels under this rule shall be reviewable immediately under MCR 9.118. All orders of the board under this rule shall be appealable immediately under MCR 9.122. The reviewing authority may issue a stay pending review or appeal.	(A) Interim Suspension. The Supreme Court, the board, or a hearing panel may order the interim suspension of a respondent who fails to comply with its lawful order. The suspension shall remain in effect until the respondent complies with the order or no longer has the power to comply. If the respondent is ultimately disciplined, the respondent shall not receive credit against the disciplinary suspension or disbarment for any time of suspension under this rule. All orders of hearing panels under this rule shall be reviewable immediately under MCR 9.118. All orders of the board under this rule shall be appealable immediately under MCR 9.122. The reviewing authority may issue a stay pending review or appeal.
(B) Contempt. The administrator may enforce a discipline order or an order granting or denying reinstatement by proceeding against a respondent for contempt of court. The proceeding must conform to MCR 3.606. The petition must	(B) Contempt. The administrator may enforce a discipline order or an order granting or denying reinstatement by proceeding against a respondent for contempt of court. The proceeding must conform to MCR 3.606. The petition must	(B) Contempt. The administrator may enforce a discipline order or an order granting or denying reinstatement by proceeding against a respondent for contempt of court. The proceeding must conform to MCR 3.606. The petition

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
be filed by the administrator in the circuit court in the county in which the alleged contempt took place, or in which the respondent resides, or has or had an office. Enforcement proceedings under this rule do not bar the imposition of additional discipline upon the basis of the same noncompliance with the discipline order.	be filed by the administrator in the circuit court in the county in which the alleged contempt took place, or in which the respondent resides, or has or had an office. Enforcement proceedings under this rule do not bar the imposition of additional discipline upon the basis of the same noncompliance with the discipline order. The circuit court shall waive fees and costs in an action brought by the administrator to enforce a disciplinary order.	must be filed by the administrator in the circuit court in the county in which the alleged contempt took place, or in which the respondent resides, or has or had an office. Enforcement proceedings under this rule do not bar the imposition of additional discipline upon the basis of the same noncompliance with the discipline order. The circuit court shall waive fees and costs in an action brought by the administrator to enforce a disciplinary order.
Rule 9.128 Costs	**Rule 9.128 Costs**	**Rule 9.128 Costs**
(A) Generally. The hearing panel and the board, in an order of discipline or an order granting or denying reinstatement, must include a provision directing the payment of costs within a specified period of time. Under exceptional circumstances, the board may grant a motion to reduce administrative costs assessed under this rule, but may not reduce the assessment for actual expenses. Reimbursement must be a condition in a reinstatement order.	(A) Generally. The hearing panel and the board, in an order of discipline or an order granting or denying reinstatement, must include a provision directing the payment of costs within a specified period of time. Under exceptional circumstances, the board may grant a motion to reduce administrative costs assessed under this rule, but may not reduce the assessment for actual expenses. Reimbursement must be a condition in a reinstatement order.	(A) Generally. The hearing panel and the board, in an order of discipline or an order granting or denying reinstatement, must include a provision directing the payment of costs within a specified period of time. Under exceptional circumstances, the board may grant a motion to reduce administrative costs assessed under this rule, but may not reduce the assessment for actual expenses. Reimbursement must be a condition in a reinstatement order.
(B) Amount and Nature of Costs Assessed. The costs assessed under these rules shall include both basic administrative costs and disciplinary expenses actually incurred by the board.	(B) Amount and Nature of Costs Assessed. The costs assessed under these rules shall include both basic administrative costs and disciplinary expenses actually incurred by the board.	(B) Amount and Nature of Costs Assessed. The costs assessed under these rules shall include both basic administrative costs and disciplinary expenses actually incurred by the board.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
the commission, a master, or a panel for the expenses of that investigation, hearing, review and appeal, if any.	the commission, a master, or a panel for the expenses of that investigation, hearing, review and appeal, if any.	the commission, a master, or a panel for the expenses of that investigation, hearing, review and appeal, if any.
(1) Basic Administrative Costs:	(1) Basic Administrative Costs:	(1) Basic Administrative Costs:
(a) for discipline by consent pursuant to MCR 9.115(F)(5), $750;	(a) for discipline by consent pursuant to MCR 9.115(F)(5), $750;	(a) for discipline by consent pursuant to MCR 9.115(F)(5), $750;
(b) for all other orders imposing discipline, $1,500;	(b) for all other orders imposing discipline, $1,500;	(b) for all other orders imposing discipline, $1,500;
(c) with the filing of a petition for reinstatement under MCR 9.124(A), where the discipline imposed was a suspension of less than 3 years, $750.	(c) with the filing of a petition for reinstatement ~~under MCR 9.124(A), where the discipline imposed was a suspension of less than 3 years, $750~~ as set forth in MCR 9.124(B)(2)(b)(i) and (ii);	(c) with the filing of a petition for reinstatement as set forth in MCR 9.124(B)(2)(b)(i) and (ii) ~~under MCR 9.124(A), where the discipline imposed was a suspension of less than 3 years, $750~~;
(d) with the filing of a petition for reinstatement under MCR 9.124(A), where the discipline imposed was a suspension of 3 years or more or disbarment, $1,500.	~~(d) with the filing of a petition for reinstatement under MCR 9.124(A), where the discipline imposed was a suspension of 3 years or more or disbarment, $1,500.~~	~~(d) with the filing of a petition for reinstatement under MCR 9.124(A), where the discipline imposed was a suspension of 3 years or more or disbarment, $1,500.~~
(2) Actual Expenses. Within 14 days of the conclusion of a proceeding before a panel or a written request from the board, whichever is later, the grievance administrator shall file with the board an itemized statement of the commission's expenses allocable to the hearing, including expenses incurred during the grievance administrator's investigation.	(2) Actual Expenses. Within 14 days of the conclusion of a proceeding before a panel or a written request from the board, whichever is later, the grievance administrator shall file with the board an itemized statement of the commission's expenses allocable to the hearing, including expenses incurred during the grievance administrator's investigation.	(2) Actual Expenses. Within 14 days of the conclusion of a proceeding before a panel or a written request from the board, whichever is later, the grievance administrator shall file with the board an itemized statement of the commission's expenses allocable to the hearing, including expenses incurred during the grievance administrator's investigation.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
Copies shall be served upon the respondent and the panel. An itemized statement of the expenses of the board, the commission, and the panel, including the expenses of a master, shall be a part of the report in all matters of discipline and reinstatement.	Copies shall be served upon the respondent and the panel. An itemized statement of the expenses of the board, the commission, and the panel, including the expenses of a master, shall be a part of the report in all matters of discipline and reinstatement.	Copies shall be served upon the respondent and the panel. An itemized statement of the expenses of the board, the commission, and the panel, including the expenses of a master, shall be a part of the report in all matters of discipline and reinstatement.
(C) Certification of Nonpayment. If the respondent fails to pay the costs within the time prescribed, the board shall serve a certified notice of the nonpayment upon the respondent. Copies must be served on the administrator and the State Bar of Michigan. Commencing on the date a certified report of nonpayment is filed, interest on the unpaid fees and costs shall accrue thereafter at the rates applicable to civil judgments.	(C) Certification of Nonpayment. If the respondent fails to pay the costs within the time prescribed, the board shall serve a certified notice of the nonpayment upon the respondent. Copies must be served on the administrator and the State Bar of Michigan. Commencing on the date a certified report of nonpayment is filed, interest on the unpaid fees and costs shall accrue thereafter at the rates applicable to civil judgments.	(C) Certification of Nonpayment. If the respondent fails to pay the costs within the time prescribed, the board shall serve a certified notice of the nonpayment upon the respondent. Copies must be served on the administrator and the State Bar of Michigan. Commencing on the date a certified report of nonpayment is filed, interest on the unpaid fees and costs shall accrue thereafter at the rates applicable to civil judgments.
(D) Automatic Suspension for Nonpayment. The respondent will be suspended automatically, effective 7 days from the mailing of the certified notice of nonpayment, and until the respondent pays the costs assessed or the board approves a suitable plan for payment. The board shall file a notice of suspension with the clerk of the Supreme Court and the State Bar of Michigan. A copy must be served on the respondent and the administrator. A respondent who is suspended for nonpayment of costs under this rule is required to comply with the requirements	(D) Automatic Suspension for Nonpayment. The respondent will be suspended automatically, effective 7 days from the mailing of the certified notice of nonpayment, and until the respondent pays the costs assessed or the board approves a suitable plan for payment. The board shall file a notice of suspension with the clerk of the Supreme Court and the State Bar of Michigan. A copy must be served on the respondent and the administrator. A respondent who is suspended for nonpayment of costs under this rule is required to comply with the	(D) Automatic Suspension for Nonpayment. The respondent will be suspended automatically, effective 7 days from the mailing of the certified notice of nonpayment, and until the respondent pays the costs assessed or the board approves a suitable plan for payment. The board shall file a notice of suspension with the clerk of the Supreme Court and the State Bar of Michigan. A copy must be served on the respondent and the administrator. A respondent who is suspended for nonpayment of costs under this rule is required to comply with

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
imposed by MCR 9.119 on suspended attorneys. (E) Reinstatement. A respondent who has been automatically suspended under this rule and later pays the costs or obtains approval of a payment plan, and is otherwise eligible, may seek automatic reinstatement pursuant to MCR 9.123(A) even if the suspension under this rule exceeded 179 days. However, a respondent who is suspended under this rule and, as a result, does not practice law in Michigan for 3 years or more, must be recertified by the Board of Law Examiners before the respondent may be reinstated.	requirements imposed by MCR 9.119 on suspended attorneys. (E) Reinstatement. A respondent who has been automatically suspended under this rule and later pays the costs or obtains approval of a payment plan, and is otherwise eligible, may seek automatic reinstatement pursuant to MCR 9.123(A) even if the suspension under this rule exceeded 179 days. However, a respondent who is suspended under this rule and, as a result, does not practice law in Michigan for 3 years or more, must be recertified by the Board of Law Examiners before the respondent may be reinstated. (F) Other Costs. The administrator shall not be charged copying costs by any court in this state when a request is made during a disciplinary investigation or prosecution for a copy of court records.	the requirements imposed by MCR 9.119 on suspended attorneys. (E) Reinstatement. A respondent who has been automatically suspended under this rule and later pays the costs or obtains approval of a payment plan, and is otherwise eligible, may seek automatic reinstatement pursuant to MCR 9.123(A) even if the suspension under this rule exceeded 179 days. However, a respondent who is suspended under this rule and, as a result, does not practice law in Michigan for 3 years or more, must be recertified by the Board of Law Examiners before the respondent may be reinstated. (F) Assessment of Costs. Other than for costs assessed under this rule, sanctions in the form of fines or costs are unavailable in disciplinary proceedings, except that, in granting an adjournment, a panel may require that a party pay costs associated with witnesses. (G) Other Costs. The administrator shall not be charged copying costs by any court in this state when a request is made during a disciplinary investigation or prosecution for a copy of court records.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
Rule 9.129 Expenses; Reimbursement	**Rule 9.129** Expenses; Reimbursement	**Rule 9.129** Expenses; Reimbursement
The state bar must reimburse each investigator, legal counsel, hearing panel member, board member, and commission member for the actual and necessary expenses the board, commission, or administrator certifies as incurred as a result of these rules.	The state bar must reimburse each investigator, legal counsel, hearing panel member, board member, master, and commission member for the actual and necessary expenses the board, commission, or administrator certifies as incurred as a result of these rules.	The state bar must reimburse each investigator, legal counsel, hearing panel member, board member, master, and commission member for the actual and necessary expenses the board, commission, or administrator certifies as incurred as a result of these rules.
Rule 9.130 MCR 8.122 Cases; Arbitration; Discipline; Filing Complaint by Administrator	**Rule 9.130** MCR 8.122 Cases; Arbitration; Discipline; Filing Complaint by Administrator	**Rule 9.130** MCR 8.122 Cases; Arbitration; Discipline; Filing Complaint by Administrator
(A) Proceedings. A proceeding on alleged misconduct to which MCR 8.122 is applicable is the same as for a request for investigation. No investigation may be made on a claim by an attorney against a client.	~~(A) Proceedings. A proceeding on alleged misconduct to which MCR 8.122 is applicable is the same as for a request for investigation. No investigation may be made on a claim by an attorney against a client.~~	~~(A) Proceedings. A proceeding on alleged misconduct to which MCR 8.122 is applicable is the same as for a request for investigation. No investigation may be made on a claim by an attorney against a client.~~
(B) Arbitration. On written agreement between an attorney and his or her client, the administrator or an attorney the administrator assigns may arbitrate a dispute and enter an award in accordance with the arbitration laws. Except as otherwise provided by this subrule, the arbitration is governed by MCR 3.602. The award and a motion for entry of an order or judgment must be filed in the court having jurisdiction under MCR 8.122. If the award recommends discipline	(~~B~~A) Arbitration. On written agreement between an attorney and his or her client, the administrator or an attorney the administrator assigns may arbitrate a dispute and enter an award in accordance with the arbitration laws. Except as otherwise provided by this subrule, the arbitration is governed by MCR 3.602. The award and a motion for entry of an order or judgment must be filed in the court having jurisdiction under MCR 8.122. If the award recommends discipline	(~~B~~A) Arbitration. On written agreement between an attorney and his or her client, the administrator or an attorney the administrator assigns may arbitrate a dispute and enter an award in accordance with the arbitration laws. Except as otherwise provided by this subrule, the arbitration is governed by MCR 3.602. The award and a motion for entry of an order or judgment must be filed in the court having jurisdiction under MCR 8.122. If the award recommends

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
of the attorney, it must also be treated as a request for investigation. (C) Complaint. If the administrator finds that the filing of a complaint in the appropriate court under MCR 8.122 will be a hardship to the client and that the client may have a meritorious claim, the administrator shall file the complaint on behalf of the client and prosecute it to completion without cost to the client. **Rule 9.131** Investigation of Member or Employee of Board or Commission; Investigation of Attorney Representing Respondent or Witness; Representation by Member or Employee of Board or Commission (A) Investigation of Commission Member or Employee. If the request is for investigation of an attorney who is a member or employee of the commission, the following provisions apply: (1) The administrator shall serve a copy of the request for investigation on the respondent by ordinary mail. Within 21 days after service, the respondent shall file with the administrator an answer to the request for investigation conforming to MCR 9.113. The administrator shall send	of the attorney, it must also be treated as a request for investigation. (€B) Complaint. If the administrator finds that the filing of a complaint in the appropriate court under MCR 8.122 will be a hardship to the client and that the client may have a meritorious claim, the administrator ~~shall~~ may file the complaint on behalf of the client and prosecute it to completion without cost to the client. **Rule 9.131** Investigation of Member or Employee of Board or Commission; Investigation of Attorney Representing Respondent or Witness; Representation by Member or Employee of Board or Commission (A) Investigation of Commission Member or Employee. If the request is for investigation of an attorney who is a member or employee of the commission, the following provisions apply: (1) The administrator shall serve a copy of the request for investigation on the respondent by ordinary mail. Within 21 days after service, the respondent shall file with the administrator an answer to the request for investigation conforming to MCR 9.113. The administrator shall send	discipline of the attorney, it must also be treated as a request for investigation. (€B) Complaint. If the administrator finds that the filing of a complaint in the appropriate court under MCR 8.122 will be a hardship to the client and that the client may have a meritorious claim, the administrator may ~~shall~~ file the complaint on behalf of the client and prosecute it to completion without cost to the client. **Rule 9.131** Investigation of Member or Employee of Board or Commission; Investigation of Attorney Representing Respondent or Witness; Representation by Member or Employee of Board or Commission (A) Investigation of Commission Member or Employee. If the request is for investigation of an attorney who is a member or employee of the commission, the following provisions apply: (1) The administrator shall serve a copy of the request for investigation on the respondent by ordinary mail. Within 21 days after service, the respondent shall file with the administrator an answer to the request for investigation conforming to MCR 9.113. The administrator shall

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
a copy of the answer to the person who filed the request for investigation. (2) After the answer is filed or the time for answer has expired, the administrator shall send copies of the request for investigation and the answer to the Supreme Court clerk. (3) The Supreme Court shall review the request for investigation and the answer and shall either dismiss the request for investigation or appoint volunteer legal counsel to investigate the matter. (4) If, after conducting the investigation, appointed counsel determines that the request for investigation does not warrant the filing of a formal complaint, he or she shall file a report setting out the reasons for that conclusion with the administrator, who shall send a copy of the report to the Supreme Court clerk, the respondent, and the person who filed the request for investigation. Review of a decision not to file a formal complaint is limited to a proceeding under MCR 9.122(A)(2). If appointed counsel determines not to file a complaint, the administrator shall close and maintain the file. MCR 9.126(A) governs the release of information regarding the investigation.	a copy of the answer to the ~~person who filed the request for investigation~~ complainant. (2) After the answer is filed or the time for answer has expired, the administrator shall send copies of the request for investigation and the answer to the Supreme Court clerk. (3) The Supreme Court shall review the request for investigation and the answer and shall either dismiss the request for investigation or appoint volunteer legal counsel to investigate the matter. (4) If, after conducting the investigation, appointed counsel determines that the request for investigation does not warrant the filing of a formal complaint, he or she shall file a report setting out the reasons for that conclusion with the administrator, who shall send a copy of the report to the Supreme Court clerk, the respondent, and ~~the person who filed the request for investigation~~ complainant. Review of a decision not to file a formal complaint is limited to a proceeding under MCR 9.122(A)(2). If appointed counsel determines not to file a complaint, the administrator shall close and maintain the file under MCR 9.114(E). MCR 9.126(A) governs the release of information regarding the investigation.	send a copy of the answer to the ~~person who filed the request for investigation~~ complainant. (2) After the answer is filed or the time for answer has expired, the administrator shall send copies of the request for investigation and the answer to the Supreme Court clerk. (3) The Supreme Court shall review the request for investigation and the answer and shall either dismiss the request for investigation or appoint volunteer legal counsel to investigate the matter. (4) If, after conducting the investigation, appointed counsel determines that the request for investigation does not warrant the filing of a formal complaint, he or she shall file a report setting out the reasons for that conclusion with the administrator, who shall send a copy of the report to the Supreme Court clerk, the respondent, and ~~the person who filed the request for investigation~~ complainant. Review of a decision not to file a formal complaint is limited to a proceeding under MCR 9.122(A)(2). If appointed counsel determines not to file a complaint, the administrator shall close and maintain the file under MCR 9.114(E). MCR 9.126(A) governs the release of information regarding the

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
		investigation.
(5) If, after conducting the investigation, appointed counsel determines that the request for investigation warrants the filing of a formal complaint, he or she shall prepare and file a complaint with the board under MCR 9.115(B).	(5) If, after conducting the investigation, appointed counsel determines that the request for investigation warrants the filing of a formal complaint, he or she shall prepare and file a complaint with the board under MCR 9.115(B).	(5) If, after conducting the investigation, appointed counsel determines that the request for investigation warrants the filing of a formal complaint, he or she shall prepare and file a complaint with the board under MCR 9.115(B).
(6) Further proceedings are as in other cases except that the complaint will be prosecuted by appointed counsel rather than by the administrator.	(6) Further proceedings are as in other cases except that the complaint will be prosecuted by appointed counsel rather than by the administrator.	(6) Further proceedings are as in other cases except that the complaint will be prosecuted by appointed counsel rather than by the administrator.
If the request is for investigation of the administrator, the term "administrator" in this rule means a member of the commission or some other employee of the commission designated by the chairperson.	If the request is for investigation of the administrator, the term "administrator" in this rule means a member of the commission or some other employee of the commission designated by the chairperson.	If the request is for investigation of the administrator, the term "administrator" in this rule means a member of the commission or some other employee of the commission designated by the chairperson.
(B) Investigation of Board Member or Employee. Before the filing of a formal complaint, the procedures regarding a request for investigation of a member or employee of the board are the same as in other cases. Thereafter, the following provisions apply:	(B) Investigation of Board Member or Employee. Before the filing of a formal complaint, the procedures regarding a request for investigation of a member or employee of the board are the same as in other cases. Thereafter, the following provisions apply:	(B) Investigation of Board Member or Employee. Before the filing of a formal complaint, the procedures regarding a request for investigation of a member or employee of the board are the same as in other cases. Thereafter, the following provisions apply:
(1) The administrator shall file the formal complaint with the board and send a copy to the Supreme Court clerk.	(1) The administrator shall file the formal complaint with the board and send a copy to the Supreme Court clerk.	(1) The administrator shall file the formal complaint with the board and send a copy to the Supreme Court clerk.
(2) The Chief Justice shall appoint a	(2) The Chief Justice shall appoint a	(2) The Chief Justice shall appoint a

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
hearing panel and may appoint a master to conduct the hearing. The hearing procedure is as provided in MCR 9.115 or 9.117, as is appropriate, except that no matters shall be submitted to the board. Procedural matters ordinarily within the authority of the board shall be decided by the hearing panel, except that a motion to disqualify a member of the panel shall be decided by the Chief Justice. (3) The order of the hearing panel is effective 21 days after it is filed and served as required by MCR 9.115(J), and shall be treated as a final order of the board. The administrator shall send a copy of the order to the Supreme Court clerk. (4) MCR 9.118 does not apply. Review of the hearing panel decision is by the Supreme Court as provided by MCR 9.122. (C) Investigation of Attorney Representing a Respondent or Witness in Proceedings Before Board or Commission. If the request is for an investigation of an attorney	hearing panel and may appoint a master to conduct the hearing. The hearing procedure is as provided in MCR 9.115, ~~or~~ 9.117, or 9.120, as is appropriate, except that no matters shall be submitted to the board. Procedural matters ordinarily within the authority of the board shall be decided by the hearing panel, except that a motion to disqualify a member of the panel shall be decided by the Chief Justice. (3) The order of the hearing panel is effective 21 days after it is filed and served as required by MCR 9.115(J), and shall be treated as a final order of the board. The administrator shall send a copy of the order to the Supreme Court clerk. (4) MCR 9.118 does not apply. Review of the hearing panel decision is by the Supreme Court as provided by MCR 9.122. (C) Investigation of Attorney Representing a Respondent or Witness in Proceedings Before Board or Commission. ~~If the request is for an investigation of an attorney~~ (1) Request by a former client. A request for investigation filed by an attorney or witness against his or her	hearing panel and may appoint a master to conduct the hearing. The hearing procedure is as provided in MCR 9.115, ~~or~~ 9.117, or 9.120, as is appropriate, except that no matters shall be submitted to the board. Procedural matters ordinarily within the authority of the board shall be decided by the hearing panel, except that a motion to disqualify a member of the panel shall be decided by the Chief Justice. (3) The order of the hearing panel is effective 21 days after it is filed and served as required by MCR 9.115(J), and shall be treated as a final order of the board. The administrator shall send a copy of the order to the Supreme Court clerk. (4) MCR 9.118 does not apply. Review of the hearing panel decision is by the Supreme Court as provided by MCR 9.122. (C) Investigation of Attorney Representing a Respondent or Witness in Proceedings Before Board or Commission. ~~If the request is for an investigation of an attorney~~ (1) Request by a former client. A request for investigation filed by an attorney or witness against his or her

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	counsel for alleged misconduct occurring in a disciplinary investigation or proceeding, shall be treated under the procedures set forth in MCR 9.112.	counsel for alleged misconduct occurring in a disciplinary investigation or proceeding, shall be treated under the procedures set forth in MCR 9.112.
for alleged misconduct committed during the course of that attorney's representation of a respondent or a witness in proceedings before the board or the commission, the procedures in subrule (A) shall be followed. A request for investigation that alleges misconduct of this type may be filed only by the chairperson of the commission, and only if the commission passes a resolution authorizing the filing by the chairperson.	(2) Request by person other than former client. If a person other than the attorney's former client requests an investigation for alleged misconduct committed during the course of that attorney's representation of a respondent or a witness in proceedings before the board or the commission, the procedures in subrule (A) shall be followed. A request for investigation that alleges misconduct of this type may be filed only by the chairperson of the commission, and only if the commission passes a resolution authorizing the filing by the chairperson.	(2) Request by person other than former client. If a person other than the attorney's former client requests an investigation for alleged misconduct committed during the course of that attorney's representation of a respondent or a witness in proceedings before the board or the commission, the procedures in subrule (A) shall be followed. A request for investigation that alleges misconduct of this type may be filed only by the chairperson of the commission, and only if the commission passes a resolution authorizing the filing by the chairperson.
(D) Representation by Commission or Board Member or Employee. A member or employee of the Attorney Grievance Commission or the Attorney Discipline Board and its hearing panels may not represent a respondent in proceedings before the commission, the board, or the Judicial Tenure Commission, including preliminary discussions with employees of the respective commission or board prior to the filing of a request for investigation.	(D) Representation by Commission or Board Member or Employee. A member or employee of the Attorney Grievance Commission or the Attorney Discipline Board and its hearing panels may not represent a respondent in proceedings before the commission, the board, or the Judicial Tenure Commission, including preliminary discussions with employees of the respective commission or board prior to the filing of a request for investigation.	(D) Representation by Commission or Board Member or Employee. A member or employee of the Attorney Grievance Commission or the Attorney Discipline Board and its hearing panels may not represent a respondent in proceedings before the commission, the board, or the Judicial Tenure Commission, including preliminary discussions with employees of the respective commission or board prior to the filing of a request for investigation.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
Rule 8.110 Chief Judge Rule	**Rule 8.110** Chief Judge Rule	**Rule 8.110** Chief Judge Rule
(A) Applicability. This rule applies to all trial courts; i.e., the judicial circuits of the circuit court, the districts of the district court, the probate court in each county or a probate district established by law, and the municipal courts.	(A) [Unchanged.]	(A) [Unchanged.]
(B) Chief Judge, Chief Judge Pro Tempore, and Presiding Judges of Divisions.	(B) [Unchanged.]	(B) [Unchanged.]
(1) The Supreme Court shall select a judge of each trial court to serve as chief judge. No later than September 1 of each odd-numbered year, each trial court with two or more judges may submit the names of no fewer than two judges whom the judges of that court recommend for selection as chief judge.		
(2) Unless a chief judge pro tempore or presiding judge is named by the Supreme Court, the chief judge shall select a chief judge pro tempore and a presiding judge of any division of the trial court. The chief judge pro tempore and any presiding judges shall fulfill such functions as the chief judge assigns.		
(3) The chief judge, chief judge pro tempore, and any presiding judges shall		

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
serve a two-year term beginning on January 1 of each even-numbered year, provided that the chief judge serves at the pleasure of the Supreme Court and the chief judge pro tempore and any presiding judges serve at the pleasure of the chief judge. (4) Where exceptional circumstances exist, the Supreme Court may appoint a judge of another court to serve as chief judge of a trial court.		
(C) Duties and Powers of Chief Judge.	(C) Duties and Powers of Chief Judge.	(C) Duties and Powers of Chief Judge.
(1) A chief judge shall act in conformity with the Michigan Court Rules, administrative orders of the Supreme Court, and local court rules, and should freely solicit the advice and suggestions of the other judges of his or her bench and geographic jurisdiction. If a local court management council has adopted the by-laws described in AO 1998-5 the chief judge shall exercise the authority and responsibilities under this rule in conformity with the provisions of AO 1998-5.	(1)-(7) [Unchanged.]	(1)-(7) [Unchanged.]
(2) As the presiding officer of the court, a chief judge shall:		
(a) call and preside over meetings of the court;		

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(b) appoint committees of the court;		
(c) initiate policies concerning the court's internal operations and its position on external matters affecting the court;		
(d) meet regularly with all chief judges whose courts are wholly or partially within the same county;		
(e) represent the court in its relations with the Supreme Court, other courts, other agencies of government, the bar, the general public, and the news media, and in ceremonial functions;		
(f) counsel and assist other judges in the performance of their responsibilities; and		
(g) cooperate with all investigations conducted by the Judicial Tenure Commission.		
(3) As director of the administration of the court, a chief judge shall have administrative superintending power and control over the judges of the court and all court personnel with authority and responsibility to:		
(a) supervise caseload management and monitor disposition of the judicial work of the court;		

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(b) direct the apportionment and assignment of the business of the court, subject to the provisions of MCR 8.111;		
(c) determine the hours of the court and the judges; coordinate and determine the number of judges and court personnel required to be present at any one time to perform necessary judicial administrative work of the court, and require their presence to perform that work;		
(d) supervise the performance of all court personnel, with authority to hire, discipline, or discharge such personnel, with the exception of a judge's secretary and law clerk, if any;		
(e) coordinate judicial and personnel vacations and absences, subject to the provisions of subrule (D);		
(f) supervise court finances, including financial planning, the preparation and presentation of budgets, and financial reporting;		
(g) request assignments of visiting judges and direct the assignment of matters to the visiting judges;		
(h) effect compliance by the court with all applicable court rules and provisions of		

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
the law; and (i) perform any act or duty or enter any order necessarily incidental to carrying out the purposes of this rule. (4) If a judge does not timely dispose of his or her assigned judicial work or fails or refuses to comply with an order or directive from the chief judge made under this rule, the chief judge shall report the facts to the state court administrator who will, under the Supreme Court's direction, initiate whatever corrective action is necessary. (5) The chief judge of the court in which criminal proceedings are pending shall have filed with the state court administrator a quarterly report listing the following cases in a format prescribed by the state court administrator: (a) felony cases in which there has been a delay of more than 301 days between the order binding the defendant over to circuit court and adjudication; (b) misdemeanor cases and cases involving local ordinance violations that have criminal penalties in which there has been a delay of more than 126 days between the date of the defendant's first appearance on the warrant and complaint		

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
or citation and adjudication; (c) In computing the 126-day and 301-day periods, the court shall exclude periods of delay. (1) between the time a preadjudication warrant is issued and a defendant is arraigned; (2) between the time a defendant is referred for evaluation to determine whether he or she is competent to stand trial and the receipt of the report; or (3) during the time a defendant is deemed incompetent to stand trial. (6) A chief judge may delegate administrative duties to a trial court administrator or others. (7) Where a court rule or statute does not already require it, the chief judge may, by administrative order, direct the clerk of the court to provide litigants and attorneys with copies of forms approved by the state court administrator. In addition, except when a court rule or statute specifies that the court or clerk of the court must provide certain forms without charge, the administrative order may allow the clerk to provide the forms at the cost of reproduction to the clerk.		

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
	(8)Notice to the Attorney Grievance Commission. The chief judge of every judicial and circuit court shall provide to the commission a certified copy of any written opinion or order entered by the court holding a lawyer in contempt or finding that a lawyer has provided incompetent representation or engaged in misconduct that reflects adversely upon the lawyer's fitness to engage in the practice of law.	(8)Notice to the Attorney Grievance Commission. The chief judge of every judicial and circuit court shall provide to the commission a certified copy of any written opinion or order entered by the court holding a lawyer in contempt or finding that a lawyer has provided incompetent representation or engaged in misconduct that reflects adversely upon the lawyer's fitness to engage in the practice of law.
(D) Court Hours; Court Holidays; Judicial Absences.	(D) [Unchanged.]	(D) [Unchanged.]
(1) Court Hours. The chief judge shall enter an administrative order under MCR 8.112(B) establishing the court's hours.		
(2) Court Holidays; Local Modification.		
(a) The following holidays are to be observed by all state courts, except those courts which have adopted modifying administrative orders pursuant to MCR 8.112(B): New Year's Day, January 1; Martin Luther King, Jr., Day, the third Monday in January in conjunction with the federal holiday; Presidents' Day, the third Monday in February; Memorial Day, the last Monday in May; Independence Day, July 4; Labor Day, the first Monday in September; Veterans' Day, November		

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
11; Thanksgiving Day, the fourth Thursday in November; Friday after Thanksgiving; Christmas Eve, December 24; Christmas Day, December 25; New Year's Eve, December 31; (b) When New Year's Day, Independence Day, Veterans' Day, or Christmas Day falls on Saturday, the preceding Friday shall be a holiday. When New Year's Day, Independence Day, Veterans' Day, or Christmas Day falls on Sunday, the following Monday shall be a holiday. When Christmas Eve or New Year's Eve falls on Friday, the preceding Thursday shall be a holiday. When Christmas Eve or New Year's Eve falls on Saturday or Sunday, the preceding Friday shall be a holiday. (c) Courts are encouraged to promulgate a modifying administrative order if appropriate to accommodate or achieve uniformity with the holiday practices of local governmental units regarding local public employees. (d) With the prior approval of the chief judge, a judge may continue a trial in progress or dispose of judicial matters on any of the listed holidays if he or she finds it to be necessary. (e) Any action taken by a court on		

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
February 12, Lincoln's birthday, or on the second Monday in October, Columbus Day, shall be valid. (3) Judicial Vacation Standard. A judge is expected to take an annual vacation leave of 20 days with the approval of the chief judge to ensure docket coordination and coverage. A judge may take an additional 10 days of annual vacation leave with the approval of the chief judge. A maximum of 30 days of annual vacation unused due to workload constraints may be carried from one calendar year into the first quarter of the next calendar year and used during that quarter, if approved by the chief judge. Vacation days do not include: (a) attendance at Michigan judicial conferences; (b) attendance, with the chief judge's approval, at educational meetings or seminars; (c) attendance, with the chief judge's approval, at meetings of judicial committees or committees substantially related to judicial administration of justice; (d) absence due to illness; or (e) administrative leave, with the chief		

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
judge's approval. (4) Judicial Education Leave Standard. A judge is expected to take judicial education leave of 2 weeks every 3 years to participate in continuing legal education and training at Michigan judicial training programs and nationally recognized judicial education programs, including graduate and refresher courses. Judicial education leave does not include judicial conferences for which attendance is required. The use of judicial education leave approved by the chief judge does not affect a judge's annual leave. (5) Judicial Professional Leave Standard. Judges are encouraged, as part of their regular judicial responsibilities, to participate in professional meetings and conferences that advance the administration of justice or the public's understanding of the judicial system; to serve on commissions and committees of state and national organizations that contribute to the improvement of the law or that advance the interests of the judicial system; and to serve on Supreme Court-appointed or in-house assignments or committees. The use of judicial professional leave approved by the chief judge does not affect a judge's annual leave or education leave.		

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(6) Approval of Judicial Absences. A judge may not be absent from the court without the chief judge's prior approval, except for personal illness. In making the decision on a request to approve a vacation or other absence, the chief judge shall consider, among other factors, the pending caseload of the judge involved. The chief judge shall withhold approval of vacation, judicial education, or judicial professional leave that conforms to these standards only if withholding approval is necessary to ensure the orderly conduct of judicial business. The chief judge shall maintain records of absences to be available at the request of the Supreme Court.		
Rule 8.120 Law Students and Recent Graduates; Participation in Legal Aid Clinics, Defender Offices, and Legal Training Programs	**Rule 8.120** Law Students and Recent Graduates; Participation in Legal Aid Clinics, Defender Offices, and Legal Training Programs	**Rule 8.120** Law Students and Recent Graduates; Participation in Legal Aid Clinics, Defender Offices, and Legal Training Programs
(A) Legal Aid Clinics; Defender Offices. Effective legal service for each person in Michigan, regardless of that person's ability to pay, is important to the directly affected person, to our court system, and to the whole citizenry. Law students and recent law graduates, under supervision by a member of the state bar, may staff public and nonprofit defender offices, and legal aid clinics that are organized under a city or county bar association or an accredited	(A) [Unchanged.]	(A) [Unchanged.]

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
law school or for the primary purpose of providing free legal services to indigent persons. (B) Legal Training Programs. Law students and recent law graduates may participate in legal training programs organized in the offices of county prosecuting attorneys, county corporation counsel, city attorneys, and the Attorney General. (C) Eligible Students. A student in a law school approved by the American Bar Association who has received a passing grade in law school courses and has completed the first year is eligible to participate in a clinic or program listed in subrules (A) and (B) if the student meets the academic and moral standards established by the dean of that school. For the purpose of this rule, a "recent law graduate" is a person who has graduated from law school within the last year. (D) Scope; Procedure. (1) A member of the legal aid clinic, in representing an indigent person, is authorized to advise the person and to negotiate and appear on the person's behalf in all Michigan courts except the Court of Appeals and the Supreme Court.	(B) Legal Training Programs. Law students and recent law graduates may participate in legal training programs organized in the offices of county prosecuting attorneys, county corporation counsel, city attorneys, the Attorney Grievance Commission, and the Attorney General. (C) [Unchanged.] (D) Scope; Procedure. (1) A member of the legal aid clinic, in representing an indigent person, is authorized to advise the person and to negotiate and appear on the person's behalf in all Michigan courts except the Court of Appeals and the Supreme Court.	(B) Legal Training Programs. Law students and recent law graduates may participate in legal training programs organized in the offices of county prosecuting attorneys, county corporation counsel, city attorneys, the Attorney Grievance Commission, and the Attorney General. (C) [Unchanged.] (D) Scope; Procedure. (1) A member of the legal aid clinic, in representing an indigent person, is authorized to advise the person and to negotiate and appear on the person's behalf in all Michigan courts except the Court of Appeals and the Supreme Court.

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
(2) Representation must be conducted under the supervision of a state bar member. Supervision by a state bar member includes the duty to examine and sign all pleadings filed. It does not require the state bar member to be present	(2) Representation must be conducted under the supervision of a state bar member. Supervision by a state bar member includes the duty to examine and sign all pleadings filed. It does not require the state bar member to be present	(2) Representation must be conducted under the supervision of a state bar member. Supervision by a state bar member includes the duty to examine and sign all pleadings filed. It does not require the state bar member to be present
(a) while a law student or graduate is advising an indigent person or negotiating on the person's behalf, or	(a) while a law student or graduate is advising an indigent person or negotiating on the person's behalf, or	(a) while a law student or graduate is advising an indigent person or negotiating on the person's behalf, or
(b) during a courtroom appearance of a law student or graduate, except in a criminal or juvenile case exposing the client to a penalty of more than 6 months.	(b) during a courtroom appearance of a law student or graduate, except in a criminal or juvenile case exposing the client to a penalty of more than 6 months.	(b) during a courtroom appearance of a law student or graduate, except in a criminal or juvenile case exposing the client to a penalty of more than 6 months.
(3) A law student or graduate may not appear in a case in a Michigan court without the approval of the judge of that court. If the judge grants approval, the judge may suspend the proceedings at any stage if he or she determines that the representation by the law student or graduate	(3) A law student or graduate may not appear in a case in a Michigan court without the approval of the judge of that court. If the judge grants approval, the judge may suspend the proceedings at any stage if he or she determines that the representation by the law student or graduate	(3) A law student or graduate may not appear in a case in a Michigan court without the approval of the judge of that court. If the judge grants approval, the judge may suspend the proceedings at any stage if he or she determines that the representation by the law student or graduate
(a) is professionally inadequate, and	(a) is professionally inadequate, and	(a) is professionally inadequate, and
(b) substantial justice requires suspension.	(b) substantial justice requires suspension.	(b) substantial justice requires suspension.
(4) A law student or graduate serving in a prosecutor's, county corporation counsel's,	(4) A law student or graduate serving in a prosecutor's, county corporation counsel's,	(4) A law student or graduate serving in a prosecutor's, county corporation

CURRENT MICHIGAN RULE	SBM WORKGROUP PROPOSAL	AGC PROPOSAL
city attorney's, or Attorney General's program may be authorized to perform comparable functions and duties assigned by the prosecuting attorney, county attorney, city attorney, or Attorney General, except that	city attorney's, the Attorney Grievance Commission, or Attorney General's program may be authorized to perform comparable functions and duties assigned by the prosecuting attorney, county attorney, city attorney, or Attorney General, except that	counsel's, city attorney's, the Attorney Grievance Commission, or Attorney General's program may be authorized to perform comparable functions and duties assigned by the prosecuting attorney, county attorney, city attorney, Attorney Grievance Commission attorney, or Attorney General, except that
(a) the law student or graduate is subject to the conditions and restrictions of this rule; and	(a) the law student or graduate is subject to the conditions and restrictions of this rule; and	(a) the law student or graduate is subject to the conditions and restrictions of this rule; and
(b) the law student or graduate may not be appointed as an assistant prosecutor, assistant corporation counsel, assistant city attorney, or assistant Attorney General.	(b) the law student or graduate may not be appointed as an assistant prosecutor, assistant corporation counsel, assistant city attorney, or assistant Attorney General.	(b) the law student or graduate may not be appointed as an assistant prosecutor, assistant corporation counsel, assistant city attorney, assistant Attorney Grievance Commission attorney, or assistant Attorney General.

Orders Entered November 23, 2010:

PROPOSED AMENDMENT OF MCR 2.117.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.117 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts/michigan.gov/supremecourt/Resources/Administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language is amended below with additions indicated in underlining and deletions indicated in strikeover.]

RULE 2.117. APPEARANCES.

(A) [Unchanged.]

(B) Appearance by Attorney.

(1) In General. An attorney may appear by an act indicating that the attorney represents a party in the action. An appearance by an attorney for a party is deemed an appearance by the party. Unless a particular rule indicates otherwise, any act required to be performed by a party may be performed by the attorney representing the party.

(2) Notice of Appearance.

(a) If an appearance is made in a manner not involving the filing of a paper with the court, the attorney must promptly file a written appearance and serve it on the parties entitled to service. The attorney's address and telephone number must be included in the appearance.

(b) If an attorney files an appearance, but takes no other action toward prosecution or defense of the action, the appearance entitles the attorney to service of pleadings and papers as provided by MCR 2.107(A).

(3) Appearance by Law Firm.

(a) A pleading, appearance, motion, or other paper filed by a law firm on behalf of a client is deemed the appearance of the individual attorney first filing a paper in the action. All notices required by these rules may be served on that individual. That attorney's appearance continues until an order of substitution or withdrawal is entered, or until the attorney's representation is terminated under subsection (C)(1). This subrule is not intended to prohibit other attorneys in the law firm from appearing in the action on behalf of the party.

(b) The appearance of an attorney is deemed to be the appearance of every member of the law firm. Any attorney in the firm may be required by the court to conduct a court ordered conference or trial.

(C) Duration of Appearance by Attorney.

(1) Unless otherwise stated or ordered by the court, and except as otherwise provided by these rules, an attorney's appearance applies only

in the court in which it is made, or to which the action is transferred, until a final judgment is entered disposing of all claims by or against the party whom the attorney represents and the time for appeal of right has passed, or until the attorney notifies the attorney's client that the attorney is terminating representation of the client. Follow-up or ministerial acts performed by the attorney with regard to the client's file following notice of termination do not extend the attorney-client relationship. The appearance applies in an appeal taken before entry of final judgment by the trial court.

(2) An attorney who has entered an appearance may withdraw from the action or be substituted for only on order of the court, or as allowed in subsection (C)(1).

Staff Comment: The proposed amendment would revise MCR 2.117 to provide that an attorney-client relationship continues until a final judgment is reached and the period allowed to appeal by right has expired unless the attorney discontinued the relationship before that time. Also the proposal would clarify that follow-up or ministerial actions performed by the attorney following notice of termination do not extend the attorney-client relationship.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2007-18. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF MCR 2.203.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.203 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/Resources/Administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

RULE 2.203. JOINDER OF CLAIMS, COUNTERCLAIMS, AND CROSS-CLAIMS.

(A)-(F) [Unchanged.]

(G) If a new party is added as a result of the filing of a counterclaim or cross-claim, the court clerk must issue a summons for the new party or parties under MCR 2.102(A). Unless the court orders otherwise, the summons issued on the filing of a counterclaim or cross-claim is valid for 21 days after it is issued, and must include the expiration date. See MCR 2.102(B)(8).

Staff Comment: This proposed amendment would clarify that summonses must be issued when a counterclaim or cross-claim is filed, and would establish an expiration date identical to the expiration date of summonses issued when a third party is added to an existing case.

The staff comment is not an authoritative construction by the Court.

PROPOSED ADOPTION OF MCR 2.412 AND PROPOSED AMENDMENTS OF MCR 2.403, 2.411, AND 3.216.

On order of the Court, this is to advise that the Court is considering proposed new Rule 2.412 of the Michigan Court Rules and amendments of Rules 2.403, 2.411, and 3.216 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/Resources/Administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language is amended below with additions indicated in underlining and deletions indicated in strikeover.]

RULE 2.412. MEDIATION COMMUNICATIONS; CONFIDENTIALITY AND DISCLOSURE.

(A) Scope and Applicability of Rule; Definitions.

(1) This rule applies to cases that the court refers to mediation as provided in MCR 2.411 and MCR 3.216.

(2) "Mediator" means an individual who conducts a mediation under these rules.

(3) "Mediation communications" include statements, whether oral or in a record, verbal or nonverbal, that occur during the mediation process or that are made for purposes of retaining a mediator or for considering, initiating, preparing for, conducting, participating in, continuing, adjourning, concluding, or reconvening a mediation.

(4) "Mediation party" means a person who participates in a mediation and whose agreement is necessary to resolve the dispute.

(5) "Mediation participant" means a mediation party, a nonparty, or a mediator who participates in or is present at a mediation.

(6) "Protected" is used as defined in the Estates and Protected Individuals Code at MCL 700.1106 *et seq.*, and "vulnerable" is used as defined in the Social Welfare Act at MCL 400.11 *et seq*.

(B) Confidentiality. Mediation communications are confidential unless the mediation parties agree otherwise or the mediation communication is

(1) included in the report of the mediator under MCR 2.411(C)(3) or MCR 3.216(H)(6) or reasonably required by court personnel to administer and evaluate the mediation program;

(2) subject to disclosure by statute or court rule;

(3) subject to an exception under subrule (C) and as limited by subrule (D)(1) and (D)(2); or

(4) disclosed to an agency responsible for the protection of individuals against conduct described in (C)(4) or (C)(5).

(C) Disclosure in Proceedings; Exceptions. Mediation communications shall not be disclosed in any proceeding, except when disclosure of the communication is

(1) necessary for a court to resolve disputes regarding the mediator's fee;

(2) necessary for a court to consider issues raised regarding a party's failure to attend under MCR 2.410(D)(3);

(3) made during a session of mediation that is open, or is required by law to be open, to the public;

(4) a report, the subject of a report, or is sought or offered to prove or disprove a threat, act, or part of a plan to inflict bodily injury or commit a crime or is used to plan, attempt, or commit a crime, or to conceal a crime or criminal activity;

(5) a report, the subject of a report, or is sought or offered to prove or disprove a claim of abuse or neglect of a child, or a protected or vulnerable adult;

(6) the subject of a report of professional misconduct filed against a mediation participant;

(7) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation participant in a matter from which the claim of misconduct or malpractice arose; or

(8) considered by a court in a proceeding to enforce, rescind, reform, or avoid liability on a document signed by the mediation parties or acknowledged by the parties on an audio or video recording that arose out of mediation if there is a finding, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available and that the need for evidence substantially outweighs the interest in protecting confidentiality and the integrity of the mediation process.

(D) Scope of Mediation Communications.

(1) If a mediation communication is subject to disclosure under subrule (C), only that portion of the communication necessary for the application of the exception may be disclosed.

(2) Disclosure of a mediation communication under subrule (C) does not render the mediation communication subject to disclosure for any other purpose.

(3) This rule does not bar disclosure of any information otherwise discoverable merely because it is disclosed in the course of mediation.

RULE 2.403. CASE EVALUATION.

(A)-(I) [Unchanged.]

(J) Conduct of Hearing.

(1)-(2) [Unchanged.]

(3) Oral presentation shall be limited to 15 minutes per side unless multiple parties or unusual circumstances warrant additional time. Information on applicable insurance policy limits and settlement negotiations not protected under MCR 2.412 shall be disclosed at the request of the case evaluation panel.

(4)-(5) [Unchanged.]

(K)-(O) [Unchanged.]

RULE 2.411. MEDIATION.

(A)-(B) [Unchanged.]

(C) Scheduling and Conduct of Mediation.

(1)-(4) [Unchanged.]

(5) Confidentiality in the mediation process is governed by MCR 2.412. ~~*Confidentiality.* Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial. Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties. This prohibition does not apply to~~

~~(a) the report of the mediator under subrule (C)(3),~~

~~(b) information reasonably required by court personnel to administer and evaluate the mediation program,~~

~~(c) information necessary for the court to resolve disputes regarding the mediator's fee, or~~

~~(d) information necessary for the court to consider issues raised under MCR 2.410(D)(3).~~

(D)-(G) [Unchanged.]

RULE 3.216. DOMESTIC RELATIONS MEDIATION.

(A)-(G) [Unchanged.]

(H) Mediation Procedure.

(1)-(7) [Unchanged.]

(8) Confidentiality in the mediation process is governed by MCR 2.412. ~~Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial. Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties. This prohibition does not apply to~~

~~(a) the report of the mediator under subrule (H)(6),~~

~~(b) information reasonably required by court personnel to administer and evaluate the mediation program,~~

~~(c) information necessary for the court to resolve disputes regarding the mediator's fee, or~~

~~(d) information necessary for the court to consider issues raised under MCR 2.410(D)(3) or 3.216(H)(2).~~

(I)-(K) [Unchanged.]

Staff Comment: Proposed new MCR 2.412 and the proposed amendments of MCR 2.403, 2.411, and 3.216 would consolidate provisions

related to mediation confidentiality into one rule and would expand the current exceptions to mediation confidentiality, as recommended by the Mediation Confidentiality and Standards of Conduct Committee convened by the State Court Administrative Office.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-30. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF MCR 2.507.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.507 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/Resources/Administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language is amended below with additions indicated in underlining and deletions indicated in strikeover.]

RULE 2.507. CONDUCT OF TRIALS.

(A)-(F) [Unchanged.]

(G) Agreements to be in Writing. An agreement or consent between the parties or their attorneys respecting the proceedings in an action~~, subsequently denied by either party,~~ is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

Staff Comment: This proposed amendment of MCR 2.507was submitted to the Court to clarify that oral agreements not made in open court to settle a case will not be enforceable. Like an agreement subject to the statute of frauds, agreements to settle a case would be required to be made in open court or in writing to be binding.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-11. Your comments

and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENTS OF MCR 6.425 AND 7.210.

On order of the Court, this is to advise that the Court is considering amendments of Rule 6.425 and Rule 7.210 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/Resources/Administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language is amended below with additions indicated in underlining and deletions indicated in strikeover.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(C) [Unchanged.]

(D) Sentencing Guidelines. The court must use the sentencing guidelines, as provided by law. Proposed scoring of the guidelines shall accompany the presentence report. If the court imposes a minimum sentence outside the recommended minimum range, the judge must explain the substantial and compelling reasons justifying that specific departure on a sentencing guideline departure form to be prescribed by the state court administrator. The completed form will be made part of the case record. The requirement to complete this form is in addition to the requirement in MCR 6.425(E)(1)(e) to articulate substantial and compelling reasons justifying a specific departure on the record.

(E)-(G) [Unchanged.]

RULE 7.210. RECORD ON APPEAL.

(A) Content of Record. Appeals to the Court of Appeals are heard on the original record.

(1) Appeal From Court. In an appeal from a lower court, the record consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, a sentencing guideline departure form prepared by the court, and the exhibits introduced. In an appeal from probate court in an estate or trust proceeding, only the order appealed from and those petitions, opinions, and other documents pertaining to it need be included.

(2)-(4) [Unchanged.]

(B)-(F)[Unchanged.]

(G) Transmission of Record. Within 21 days after the briefs have been filed or the time for filing the appellee's brief has expired, or when the

court requests, the trial court or tribunal clerk shall send to the Court of Appeals the record on appeal in the case pending on appeal, except for those things omitted by written stipulation of the parties. Weapons, drugs, or money are not to be sent unless the Court of Appeals requests. The trial court or tribunal clerk shall append a certificate identifying the name of the case and the papers with reasonable definiteness and shall include as part of the record:

(1) a register of actions in the case;

(2) all opinions, findings, and orders of the court or tribunal, including any sentencing guideline departure form prepared by the court; and

(3) the order or judgment appealed from.

Transcripts and all other documents which are part of the record on appeal must be attached in one or more file folders or other suitable hard-surfaced binders showing the name of the trial court or tribunal, the title of the case, and the file number.

(H)-(I) [Unchanged.]

Staff Comment: This proposal would require a sentencing judge to prepare and include with the case record a form in which the judge outlines the reason or reasons for departure from the sentencing guidelines. The duty to do so would be in addition to the obligation to state such reasons on the record. The proposal is designed to provide litigants and appellate courts a clear and unambiguous recitation of the reasons for departure by the sentencing court.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-10. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENTS OF CANONS 4 AND 5 OF THE MICHIGAN CODE OF JUDICIAL CONDUCT.

On order of the Court, this is to advise that the Court is considering amendments of Canon 4 and Canon 5 of the Michigan Code of Judicial Conduct. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website at http://courts.michigan.gov/supremecourt/Resources/Administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language is amended below with additions indicated in underlining and deletions indicated in strikeover.]

CANON 4. A JUDGE MAY ENGAGE IN ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM, AND THE ADMINISTRATION OF JUSTICE.

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

A judge, subject to the proper performance of judicial duties, may engage in the following quasi-judicial activities:

A. A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. A judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and may otherwise consult with such executive or legislative body or official on such matters.

C. A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds, including speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such organization, and may participate in ~~their~~ management and investment of the funds, but should not individually solicit funds. To the extent practicable, a judge must be shielded from the identity of contributors and the amount of their contributions. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

CANON 5. A JUDGE SHOULD REGULATE EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL DUTIES.

A. Avocational Activities. A judge may write, lecture, teach, speak, and consult on nonlegal subjects, appear before public nonlegal bodies, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of the office or interfere with the performance of judicial duties.

B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve and be listed as an officer, director, trustee, or nonlegal advisor of a bona fide educational, religious, charitable, fraternal, or civic organization~~, subject to the following limitations:~~

~~(1) A judge should not serve if~~ unless it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.

~~(2)~~C. A judge should not individually solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the office for that purpose~~, but may be listed as an officer, director, or trustee of such an organization~~. A judge may, however, join a general appeal on behalf of an educational, religious, charitable, or fraternal organization, ~~or speak on behalf of such organization~~ and may speak at, receive an award or other recognition at, be featured on the program of, and permit his or her title to be used in connection with an event of such organization. To the extent practicable, a judge must be shielded from the identity of contributors and the amount of their contributions.

C-G. [Relettered but unchanged.]

Staff Comment: The proposal contained in this order seeks to clarify the role a judge may play in fundraising events for law-related and educational, religious, charitable, fraternal, or civic organizations. The proposal would specifically allow a judge to speak, appear, or be a guest or accept an award at a fundraising event of both law-related and educational, charitable, religious, and civic organizations, and must be shielded as much as possible from knowing who has contributed and the amount of contributions.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-11. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Orders Entered December 21, 2010:

PROPOSED AMENDMENTS OF MCR 2.112, 7.206, AND 7.213.

On order of the Court, this is to advise that the Court is considering amendment of Rules 2.112, 7.206, and 7.213 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted on the Supreme Court's website at the following address: www.courts.michigan.gov/supremecourt/Resources/Administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language is amended below with additions indicated in underlining and deletions indicated in strikeover.]

RULE 2.112. PLEADING SPECIAL MATTERS.

(A)-(L) [Unchanged.]

(M) Headlee Amendment Actions. In an action brought pursuant to Const 1963, art 9, § 32, alleging a violation of Const 1963, art 9, §§ 25-34, the pleadings shall conform to the requirements of MCR 2.111~~factual basis for the alleged violation or a defense must be stated with particularity. In an action involving Const 1963, art 9, § 29, the plaintiff must state with particularity the type and extent of the harm and whether there has been a violation of either the first or second sentence of that section. In an action involving the second sentence of Const 1963, art 9, §29, the plaintiff must state with particularity the activity or service involved. All statutes involved in the case must be identified, and copies of all ordinances and municipal charter provisions involved, and any available documentary evidence supportive of a claim or defense, must be attached to the pleading. The parties may supplement their pleadings with additional documentary evidence as it becomes available to them~~.

(N) [Unchanged.]

RULE 7.206. EXTRAORDINARY WRITS, ORIGINAL ACTIONS, AND ENFORCEMENT ACTIONS.

(A)-(C) [Unchanged.]

(D) Actions for Extraordinary Writs and Original Actions.

(1) Filing of Complaint. To commence an original action, the plaintiff shall file with the clerk:

(a) for original actions ~~filed under Const 1963, art 9, §§ 25-34,~~ 5 copies of a complaint (one signed) ~~that conforms to the special requirements of MCR 2.112(M), and~~ , which indicates whether there are any factual questions that must be resolved; for all other extraordinary writs and original actions, 5 copies of a complaint (one signed), which may have copies of supporting documents or affidavits attached to each copy;

(b) 5 copies of a supporting brief (one signed) conforming to MCR 7.212(C) to the extent possible;

(c) proof that a copy of each of the filed documents was served on every named defendant and, in a superintending control action, on any other party involved in the case which gave rise to the complaint for superintending control; and

(d) the entry fee.

(2) Answer. The defendant or any other interested party must file with the clerk within 21 days of service of the complaint and any supporting documents or affidavits:

(a) for original actions ~~filed under Const 1963, art 9, §§ 25-34,~~ 5 copies of an answer to the complaint (one signed) ~~that conforms to the special requirements of MCR 2.112(M), and~~ which indicates whether there are any factual questions that must be resolved; for all other extraordinary

writs and original actions, 5 copies of an answer to the complaint (one signed), which may have copies of supporting documents or affidavits attached to each copy;

(b) 5 copies of an opposing brief (one signed) conforming to MCR 7.212(D) to the extent possible; and

(c) proof that a copy of each of the filed documents was served on the plaintiff and any other interested party.

(3) [Unchanged.]

(E) Actions to Enforce the Headlee Amendment, Pursuant to Const 1963, art 9, § 32.

(1) Filing of Complaint. To commence an action pursuant to Const 1963, art 9, § 32, the plaintiff shall file with the clerk:

(a) 5 copies of the complaint (1 signed) which indicates, inter alia, whether there are any factual questions that are anticipated to require resolution by the court;

(b) proof that a copy of each of the filed documents was served on every named defendant and the office of the attorney general; and

(c) the entry fee.

(2) Answer. The named defendant(s) shall file with the clerk within 21 days of service of the complaint:

(a) 5 copies of an answer to the complaint (1 signed) which indicates, inter alia, whether there are any factual questions that must be resolved by the court from the defendant's perspective.

(b) proof that a copy of each of the filed documents was served on every named plaintiff.

(3) Subsequent proceedings. Following receipt of the answer:

(a) the chief judge shall promptly assign a panel of the court to commence proceedings in the suit;

(b) the suit may be referred by the panel of the court to a special master for purposes of pretrial proceedings, conducting a trial to receive evidence and arguments of law, and issue a written report for the court setting forth findings of fact and conclusion of law. The proceedings before the special master shall proceed as expeditiously as due consideration of the facts and issues of law requires;

(c) if the panel of the court determines that the issues framed in the parties' pleadings solely present questions of law, the court may elect not to refer the suit to a special master; and

(d) following receipt of the report from the special master or upon the panel electing not to refer the suit to a special master, the court shall notify counsel for the parties of the schedule for filing briefs in response to the special master's report or based on the issues framed in the pleadings and setting the date for oral argument, which shall be on an expedited basis. The proceedings shall take precedence over other non-emergency matters pending before the court.

~~(E)~~(F) [Former (E) has been relettered as (F), but otherwise is unchanged.]

RULE 7.213. CALENDAR CASES.

(A)-(B) [Unchanged.]

(C) Priority on Calendar. The priority of cases on the session calendar is in accordance with the initial filing dates of the cases, except that precedence shall be given to:

(1) interlocutory criminal appeals;

(2) child custody cases;

(3) interlocutory appeals from the grant of a preliminary injunction;

(4) appeals from all cases involving election issues, including, but not limited to, recall elections and petition disputes;

(5) appeals of decisions holding that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid; ~~and~~

(6) actions brought under sections 29-34 of the Michigan Constitution (Headlee actions); and

(7) cases that the court orders expedited.

(D)-(E) [Unchanged.]

Staff Comment: The proposed amendments of MCR 2.112 and MCR 7.206 were submitted by the Legislative Commission on Statutory Mandates as a way to increase the efficiency with which Headlee actions are considered and disposed in Michigan courts, and to regularize the procedures that relate to Headlee proceedings. The proposed amendment of MCR 7.213 was added to the proposal as a corollary to proposed MCR 7.206 to clarify the prioritization of cases.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-05. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENTS OF MCR 3.501.

On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 3.501 of the Michigan Court Rules. Before determining whether one of the alternative proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at the following website address: www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language is amended below with additions indicated in underlining and deletions indicated in strikeover.]

ALTERNATIVE A

RULE 3.501. CLASS ACTIONS.

(A) [Unchanged.]

(B) Procedure for Certification of Class Action.

(1) Motion; Supplemental Motions; Motion for Revocation or Amendment.

(a) Within 91 days after the filing of a complaint that includes class action allegations, the plaintiff must move for certification that the action may be maintained as a class action.

(b) The time for filing the motion may be extended by order on stipulation of the parties or on motion for cause shown.

(c) A party may file a supplemental motion for certification of a class if the circumstances surrounding the initial motion for certification have substantially changed following the filing of the initial motion. A supplemental motion must be filed within 21 days of the date when the party knew or should have known of the changed circumstances.

(d) A party may file a motion for revocation or amendment of the certification.

(2) Effect of Failure to File Motion. If the plaintiff fails to file a certification motion within the time allowed by subrule (B)(1) (a), the defendant may file a notice of the failure. On the filing of such a notice, the class action allegations are deemed stricken, and the action continues by or against the named parties alone. The class action allegations may be reinstated only if the plaintiff shows that the failure was due to excusable neglect.

(3) Action by Court.

(a) Except on motion for good cause, the court shall not proceed with consideration of the motion to certify until service of the summons and complaint on all named defendants or until the expiration of any unserved summons under MCR 2.102(D).

(b) The court may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures. The court also may consider a supplemental motion for certification, or a motion to revoke or amend the certification.

(c) In an order certifying a class action, the court shall set forth a description of the class.

(d) When appropriate the court may order that

(i) the action be maintained as a class action limited to particular issues or forms of relief, or

(ii) a proposed class be divided into separate classes with each treated as a class for purposes of certifying, denying certification, or revoking a certification.

(e) If certification is denied or revoked, the action shall continue by or against the named parties alone.

(C)-(I) [Unchanged.]

ALTERNATIVE B

RULE 3.501. CLASS ACTIONS.

(A) [Unchanged.]

(B) Procedure for Certification of Class Action.

(1) Motion.

(a) Within 91 days after the filing of a complaint that includes class action allegations, the plaintiff must move for certification that the action may be maintained as a class action. A plaintiff is entitled to file one and only one motion for class certification.

(b) The time for filing the motion may be extended by order on stipulation of the parties or on motion for cause shown.

(2) Effect of Failure to File Motion. If the plaintiff fails to file a certification motion within the time allowed by subrule (B)(1), the defendant may file a notice of the failure. On the filing of such a notice, the class action allegations are deemed stricken, and the action continues by or against the named parties alone. The class action allegations may be reinstated only if the plaintiff shows that the failure was due to excusable neglect.

(3) Action by Court.

(a) Except on motion for good cause, the court shall not proceed with consideration of the motion to certify until service of the summons and complaint on all named defendants or until the expiration of any unserved summons under MCR 2.102(D).

(b) The court may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures. After granting a motion to certify a class action, the court may amend or revoke the certification.

(c) In an order certifying a class action, the court shall set forth a description of the class.

(d) When appropriate the court may order that

(i) the action be maintained as a class action limited to particular issues or forms of relief, or

(ii) a proposed class be divided into separate classes with each treated as a class for purposes of certifying, denying certification, or revoking a certification.

(e) If certification is denied or revoked, the action shall continue by or against the named parties alone.

(C)-(I) [Unchanged.]

Staff Comment: The proposed amendment of MCR 3.501(B) in Alternative A would require a change in circumstances to have occurred that would allow a party to file a supplemental motion for certification of a class within 21 days of the party's knowledge of the changed circumstances. The proposed amendment also would allow a party to file a motion for revocation or amendment of the certification. The court as well would be allowed to consider supplemental motions to recertify and revoke or amend the certification. The proposed amendment of MCR

3.501(B) in Alternative B would clarify that only one motion for certification may be brought, and that once granted, the certification may be amended or revoked.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-18. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF MCR 6.005.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.005 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/Resources/Administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language is amended below with additions indicated in underlining and deletions indicated in strikeover.]

RULE 6.005. RIGHT TO ASSISTANCE OF LAWYER; ADVICE; APPOINTMENT FOR INDIGENTS; WAIVER; JOINT REPRESENTATION; GRAND JURY PROCEEDINGS.

(A)-(G) [Unchanged.]

(H) Scope of Trial Lawyer's Responsibilities. The responsibilities of the trial lawyer appointed to represent the defendant include

(1) representing the defendant in all trial court proceedings through initial sentencing,

(2) filing of interlocutory appeals the lawyer deems appropriate, and

(3) responding to any preconviction appeals by the prosecutor; . The defendant's lawyer must either:

(i) file a substantive brief in response to a prosecutor's interlocutory application for leave to appeal, or

(ii) notify the Court of Appeals that the lawyer will not be filing a brief in response to the application. ~~and~~

(4) Unless~~unless~~ an appellate lawyer has been appointed, the trial lawyer appointed to represent the defendant is responsible for filing ~~of~~ postconviction motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing.

(I) [Unchanged.]

Staff Comment: The proposed amendment would revise MCR 6.005(H) to clarify that appointed defense counsel in a criminal proceeding either must file a substantive response to a prosecutor's application for interlocutory appeal or notify the Court of Appeals that the lawyer intends not to submit a pleading.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-28. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULE 3 OF THE RULES CONCERNING THE STATE BAR OF MICHIGAN AND RULE 8 OF THE RULES FOR THE BOARD OF LAW EXAMINERS.

On order of the Court, this is to advise that the Court is considering amendment of Rule 3 of the Rules Concerning the State Bar of Michigan and Rule 8 of the Rules for the Board of Law Examiners. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website at http://courts.michigan.gov/supremecourt/Resources/Administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language is amended below with additions indicated in underlining and deletions indicated in strikeover.]

RULES CONCERNING THE STATE BAR OF MICHIGAN

RULE 3. MEMBERSHIP CLASSES.

(A)-(D) [Unchanged.]

(E) Resignation. An active or inactive member who is not subject to pending disciplinary action in this state or any other jurisdiction may resign from membership by notifying the secretary of the State Bar in writing. The secretary shall notify the member when the request is accepted, whereupon the member no longer will be qualified to practice law in Michigan and no longer will be eligible to receive any other member benefits. The secretary of the State Bar also shall notify the clerk of the Supreme Court of the resignation. To be readmitted as a member of the State Bar, a person who has voluntarily resigned and who is not otherwise eligible for admission without examination under Rule 5 of the Rules for the Board of Law Examiners must reapply for admission, satisfy the Board of Law Examiners that the person possesses the

requisite character and fitness to practice law, obtain a passing score on the Michigan Bar Examination, and pay applicable fees and dues. Resignation does not deprive the Attorney Grievance Commission or the Attorney Discipline Board of jurisdiction over the resignee with respect to misconduct that occurred before the effective date of resignation.

(F) Emeritus Membership. Effective October 1, 2004, an active or inactive member who is 70 years of age or older or has been a member of the State Bar for at least 30 years, and who is not subject to pending disciplinary action in this state or any other jurisdiction, may elect emeritus status by notifying the secretary of the State Bar in writing. The secretary shall notify the member when the request is accepted, whereupon the member no longer will be qualified to practice law in Michigan, but will be eligible to receive other member benefits as directed by the Board of Commissioners of the State Bar. The secretary of the State Bar also shall notify the clerk of the Supreme Court when a member is given emeritus status. Members who were age 70 or older as of October 1, 2003, who resigned or were suspended from membership after October 1, 2003, but before September 30, 2004, for nonpayment of dues are to be automatically reinstated as emeritus members, effective October 1, 2004, unless they notify the secretary of the State Bar that they do not wish to be reinstated.

(1) Grievances and Discipline. Emeritus status does not deprive the Attorney Grievance Commission or the Attorney Discipline Board of jurisdiction over the emeritus member.

(2) Readmission. To be readmitted as an active member of the State Bar, ~~an emeritus member~~ a member who has voluntarily elected emeritus status and who is not otherwise eligible for admission without examination under Rule 5 of the Rules for the Board of Law Examiners must reapply for admission, satisfy the Board of Law Examiners that the person possesses the requisite character and fitness to practice law, obtain a passing score on the Michigan Bar Examination, and pay applicable fees and dues.

RULES FOR THE BOARD OF LAW EXAMINERS

RULE 8. RECERTIFICATION.

An applicant for recertification shall file an application and other material required by the Board. After a hearing the Board shall either recertify the applicant or require that the applicant pass the examination described in Rule 3. An applicant may use the Board's subpoena power for the hearing. An applicant who is an inactive State Bar member or who had previously voluntarily resigned from the State Bar or who previously elected emeritus status, and who has been employed in another jurisdiction in one of the ways listed in Rule 5(A)(6) is entitled to recertification by the Board.

Staff Comment: The proposed amendment of SBR 3(E), submitted by the State Bar of Michigan, would clarify that an out-of-state attorney who voluntarily resigned from the Michigan bar would not be required to retake the Michigan Bar Examination if the person meets the criteria for admission without examination under Rule 5 of the Rules for the Board

of Law Examiners. A similar change also would be made in SBR 3(F) regarding emeritus members. Finally, Rule 8 of the Rules for the Board of Law Examiners would be amended to reflect that resigned or emeritus members who seek readmission are covered under Rule 8, which allows for recertification.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-20. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF MCR 5.208.

On order of the Court, this is to advise that the Court is considering amendment of Rule 5.208 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website at http://courts.michigan.gov/supremecourt/Resources/Administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language is amended below with additions indicated in underlining and deletions indicated in strikeover.]

RULE 5.208. NOTICE TO CREDITORS, PRESENTMENT OF CLAIMS.

(A) Publication of Notice to Creditors; Contents. Unless the notice has already been given, the personal representative must publish, and a special personal representative may publish, in a newspaper, as defined by MCR 2.106(F), in a county in which a resident decedent was domiciled or in which the proceeding as to a nonresident was initiated, a notice to creditors as provided in MCL 700.3801. The notice must include:

(1) The name, and, if known, ~~last known address,~~ the date of death~~,~~ and date of birth of the decedent;

(2) The name and address of the personal representative;

(3) The name and address of the court where proceedings are filed; and

(4) A statement that claims will be forever barred unless presented to the personal representative, or to both the court and the personal representative within 4 months after the publication of the notice.

(B)–(F) [Unchanged.]

Staff Comment: This proposed amendment of MCR 5.208(A) would remove the requirement to list a decedent's last known address on the

Notice to Creditors form. The proposed revision has been published for comment because of a concern that providing such information and publishing it in a newspaper might identify a location where a surviving spouse may be living and may unnecessarily place such a person at risk of harm.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-29. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered February 1, 2011:

PROPOSED AMENDMENT OF MCR 3.707.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.707 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below with additions indicated in underlining and deletions indicated in strikeover.]

RULE 3.707. MODIFICATION, TERMINATION, OR EXTENSION OF ORDER.

(A) Modification or Termination.

(1) Time for Filing and Service.

(a) The petitioner may file a motion to modify or terminate the personal protection order and request a hearing at any time after the personal protection order is issued.

(b) The respondent may file a motion to modify or terminate ~~the~~ an ex parte personal protection order or an ex parte order extending a personal protection order and request a hearing within 14 days after being served with, or receiving actual notice of, the order unless good cause is shown for filing the motion after the 14 days have elapsed.

(c) The moving party shall serve the motion to modify or terminate the order and the notice of hearing at least 7 days before the hearing date as provided in MCR 2.105(A)(2) at the mailing address or addresses provided to the court. On an appropriate showing, the court may allow service in another manner as provided in MCR 2.105(I). If the moving

party is a respondent who is issued a license to carry a concealed weapon and is required to carry a weapon as a condition of employment, a police officer certified by the Michigan law enforcement training council act of 1965, 1965 PA 203, MCL 28.601 to 28.616, a sheriff, a deputy sheriff or a member of the Michigan department of state police, a local corrections officer, department of corrections employee, or a federal law enforcement officer who carries a firearm during the normal course of employment, providing notice one day before the hearing is deemed as sufficient notice to the petitioner.

(2) Hearing on the Motion. The court must schedule and hold a hearing on a motion to modify or terminate a personal protection order within 14 days of the filing of the motion, except that if the respondent is a person described in MCL 600.2950(2) or 600.2950a(2), the court shall schedule the hearing on the motion within 5 days after the filing of the motion.

(3) Notice of Modification or Termination. If a personal protection order is modified or terminated, the clerk must immediately notify the law enforcement agency specified in the personal protection order of the change. A modified or terminated order must be served as provided in MCR 2.107.

(B)-(D) [Unchanged.]

Staff Comment: This proposal, submitted by the Michigan Judges Association, would clarify that the right to bring a motion to modify or terminate a personal protection order as established by MCR 3.707 applies to ex parte PPOs.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by June 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-17. Your comments and the comments of others will be posted at www.courts.mi.gov/resources/administrative/index.htm.

Index-Digest

INDEX–DIGEST

ACTIONS—*See*
ENVIRONMENT 1

ADMINISTRATIVE LAW—*See*
ENVIRONMENT 1

AUTOPSIES—*See*
MEDICAL EXAMINERS 1

CAMPAIGN FINANCE ACT—*See*
ELECTIONS 1

CAPPING OF TAXABLE VALUE OF REAL PROPERTY—*See*
TAXATION 1, 2

CAUSES OF DELAYS—*See*
CRIMINAL LAW 2

CHILD SUPPORT—*See*
PARENT AND CHILD 1

COMMENCEMENT OF ACTION—*See*
CRIMINAL LAW 1

CONTRIBUTIONS TO POLITICAL ACTION COMMITTEES—*See*
ELECTIONS 1

CONVEYANCES—*See*
TAXATION 2

CRIMINAL LAW

SPEEDY TRIAL

1. The statutory 180-day rule requires the dismissal of a criminal case pending against a defendant who is an inmate of a state correctional facility only if action is not commenced in the case within 180 days after the prosecutor receives the required notice from the Department of Corrections of the place of the inmate's imprisonment and a request for final disposition; if the prosecution has proceeded promptly within 180 days to move the case to the point of readiness for trial, dismissal is not required unless, after some preliminary step in the case occurs, that initial action is followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly (MCL 780.131[1], 780.133). *People v Lown*, 488 Mich 242.
2. Delays attributable to the prosecutor or the court both within and after the statutory 180-day period within which action must be commenced against an inmate of a state correctional facility may be relevant to whether delay beyond the period is inexcusable or whether the prosecutor lacked an evident intent to bring the case to trial promptly; they are not relevant for calculating the statutory 180-day period itself (MCL 780.131[1], 780.133). *People v Lown*, 488 Mich 242.
3. The provision divesting a court of jurisdiction if action against an inmate of a state correctional facility is not commenced in accordance with the statutory 180-day rule relates to personal jurisdiction and may be waived or forfeited by the defendant (MCL 780.131[1], 780.133). *People v Lown*, 488 Mich 242.

DEDICATIONS OF STREETS—*See*

PROPERTY 1

DELAYS IN CRIMINAL PROCEEDINGS AGAINST INMATES—*See*

CRIMINAL LAW 1, 2, 3

ELECTIONS

MICHIGAN CAMPAIGN FINANCE ACT

1. A public school's administration of a payroll deduction

system that remits money to a political action committee that is a segregated fund is not precluded by the statutory prohibition against using public resources to make an expenditure, make a contribution, or provide certain volunteer personal services in connection with campaign financing (MCL 169.204[3], 169.255, 169.257). *Michigan Ed Ass'n v Secretary of State*, 488 Mich 18.

ENVIRONMENT

ENVIRONMENTAL PROTECTION ACT

1. An administrative decision to authorize activity that will allegedly harm the environment may form the basis for an action against the agency under the Michigan Environmental Protection Act (MCL 324.1701 *et seq*.). *Anglers of the AuSable v Department of Environmental Quality*, 488 Mich 69.

ENVIRONMENTAL PROTECTION ACT—*See*

ENVIRONMENT 1

FRONT-LOT PROPERTY OWNERS—*See*

PROPERTY 1

INSURANCE

RESIDENT INSURANCE PRODUCER LICENSES

1. The 2008 amendments of the Insurance Code that require the Commissioner of the Office of Financial and Insurance Regulation to deny applications for resident insurance producer licenses by convicted felons apply only prospectively and do not require the revocation of any existing licenses (MCL 500.1205; 500.1239[1][f]). *King v State of Michigan*, 488 Mich 208.

INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE—*See*

SENTENCES 1

JOINT TENANCIES—*See*

TAXATION 1, 2

JURISDICTION—*See*

CRIMINAL LAW 3

LICENSING OF CONVICTED FELONS—*See*

INSURANCE 1

MEDICAL EXAMINERS

AUTOPSIES

1. Under Michigan common law and statutory law before 2010 PA 108 was enacted, a decedent's next of kin had no right to possess the decedent's brain after it was no longer needed for lawful forensic examination (MCL 52.205). *In re Certified Question*, 488 Mich 1.

MICHIGAN CAMPAIGN FINANCE ACT—*See*

ELECTIONS 1

MICHIGAN ENVIRONMENTAL PROTECTION ACT—*See*

ENVIRONMENT 1

OBLIGATION OF PARENTS TO SUPPORT MINOR CHILDREN—*See*

PARENT AND CHILD 1

OFFENSE VARIABLE 19—*See*

SENTENCES 1

180-DAY RULE—*See*

CRIMINAL LAW 1, 2, 3

PARENT AND CHILD

TERMINATION OF PARENTAL RIGHTS

1. The termination of a person's parental rights does not automatically end that person's obligation to support his or her child (MCL 712A.19b, 722.3[1]). *In re Beck*, 488 Mich 6.

PAYROLL DEDUCTION PLANS—*See*

ELECTIONS 1

PERSONAL JURISDICTION—*See*

CRIMINAL LAW 3

PLATS—*See*

PROPERTY 1

PROPERTY

See, also, TAXATION 1, 2

RIPARIAN RIGHTS

1. The property interest conveyed by a statutory dedication of a public road that runs parallel to a body of water or watercourse does not divest the owners of the properties in the first row of lots on the landward side of the road of their riparian rights. *Baum Family Trust v Babel*, 488 Mich 136.

PROPERTY TAXES—*See*

TAXATION 1, 2

PUBLIC BODIES—*See*

ELECTIONS 1

RESIDENT INSURANCE PRODUCER LICENSES—*See*

INSURANCE 1

RETURN OF BODY PARTS—*See*

MEDICAL EXAMINERS 1

RIPARIAN RIGHTS—*See*

PROPERTY 1

SCORING OFFENSE VARIABLES—*See*

SENTENCES 1

SENTENCES

SENTENCING GUIDELINES

1. Points may be assessed under offense variable 19, which pertains to interference with the administration of justice, for conduct that occurred after the sentencing offense was completed (MCL 777.49). *People v Smith*, 488 Mich 193.

SENTENCING GUIDELINES—*See*

SENTENCES 1

SPEEDY TRIAL—*See*

CRIMINAL LAW 1, 2, 3

STREET DEDICATIONS—*See*

PROPERTY 1

TAXATION

PROPERTY

1. A transfer of ownership that creates or terminates a joint tenancy between two or more people does not lift the cap placed on the taxable value of the property by the 1994 amendment of Const 1963, art 9, § 3 (commonly called "Proposal A") if at least one of them was an original owner of the property before the joint tenancy was initially created and, if the property is held as a joint tenancy at the time of conveyance, at least one of them was a joint tenant when the joint tenancy was initially created and has remained a joint tenant since that time (MCL 211.27a[3], [6], [7][h]). *Klooster v City of Charlevoix*, 488 Mich 289.
2. The termination of a joint tenancy occasioned by the death of the only other joint tenant is a conveyance for purposes of MCL 211.27a and does not require a written instrument beyond that which initially created the joint tenancy to be considered a conveyance under that provision; however, the termination will not lift the cap placed on the taxable value of the property by the 1994 amendment of Const 1963, art 9, § 3 (commonly called "Proposal A") if the conveyance fits within the joint-tenancy exclusion from what constitutes a "transfer of ownership" found in MCL 211.27a(7)(h). *Klooster v City of Charlevoix*, 488 Mich 289.

TERMINATION OF PARENTAL RIGHTS—*See*

PARENT AND CHILD 1

TRANSFERS OF OWNERSHIP—*See*

TAXATION 1